Supreme Court, U.S.
FILED
09-682 DEC 10 2009
OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

LEONARD BOSACK, *ET AL.*,
Petitioners,

v.

DAVID C. SOWARD, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL H. BROMBERG
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Suite 560
Redwood Shores, CA 94065

FRED G. BENNETT
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017

SRI SRINIVASAN
(*Counsel of Record*)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

STEVEN L. SMITH
ROBIN E. DEVAUX
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Attorneys for Petitioners

QUESTION PRESENTED

A panel of arbitrators awarded respondents nearly $20 million in punitive damages, roughly 20 times the $1 million in compensatory damages it awarded for purely economic harm. That punitive damages award exceeds by a factor of 20 the amount that a jury or court could have awarded under this Court's due process precedents. The district court and court of appeals nonetheless declined to vacate the award because, in their view, due process limitations do not apply to arbitral awards of punitive damages. The lower courts have divided on the following question presented by this case:

Whether an arbitral award of punitive damages is subject to constitutional constraints on excessiveness.

PARTIES TO THE PROCEEDING

Petitioners are Leonard Bosack; Sandy Lerner; Cartesian Partners LP; The Leonard Bosack Trust; The Sandy Lerner Trust; Richard Troiano; The & Trust; & Capital Partners; The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc.; and Capital Inc., petitioners-appellants below.

Respondents are David C. Soward and & Management Company, respondents-appellees below.

RULE 29.6 DISCLOSURE

The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc. and Capital Inc. have no parent corporations, and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

A. FEDERAL AND STATE COURTS ARE IN CONFLICT OVER WHETHER ARBITRAL AWARDS OF PUNITIVE DAMAGES ARE SUBJECT TO CONSTITUTIONAL DUE PROCESS LIMITS 8

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT 12

C. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ARBITRAL AWARD OF PUNITIVE DAMAGES IS NOT SUBJECT TO DUE PROCESS EXCESSIVENESS LIMITS 14

TABLE OF CONTENTS
(Continued)

Page

CONCLUSION 17

APPENDIX 1a

Appendix A. Ninth Circuit Amended Opinion 1a

Appendix B. Ninth Circuit Original Opinion 21a

Appendix C. District Court Judgment & Order ... 40a

Appendix D. District Court Arbitration Order 47a

Appendix E. Final Arbitration Award 73a

Appendix F. Interim 5th Award 89a

Appendix G. Interim 4th Award 99a

Appendix H. Ninth Circuit Stay Order 130a

Appendix I. Ninth Circuit Reconsideration Order 133a

TABLE OF AUTHORITIES

Page(s)

CASES

Birmingham News Co. v. Horn,
901 So. 2d 27 (Ala. 2004) 9, 10, 12

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 6

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 14

Davis v. Prudential Secs., Inc.,
59 F.3d 1186 (11th Cir. 1995) 8, 12

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 14, 15

Exxon Shipping Co. v. Baker,
128 S. Ct. 2605 (2008) 2, 15

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 15

Hereford v. D.R. Horton, Inc.,
13 So. 3d 375 (Ala. 2009) 10

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 2, 15

Knepp v. Credit Acceptance Corp.,
229 B.R. 821 (Bankr. N.D. Ala. 1999) 11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 12

MedValUSA Health Programs, Inc. v. Memberworks, Inc.,
872 A.2d 423 (Conn. 2005) 9, 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 10, 11

Porush v. Lemire, 6 F. Supp. 2d 178 (E.D.N.Y. 1998) 9

Sanders v. Gardner, 7 F. Supp. 2d 151 (1998) 10, 11

Sawtelle v. Waddell & Reed, Inc. 304 A.D.2d 103 (N.Y. App. Div. 2003) 10, 12

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 2

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 11

STATUTE

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

Edward Wood Dunham, *Are There Due Process Limits on Arbitral Punitive Damage Awards?*, 23 Franchise L.J. 3 (2003) 13

Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577 (1997) 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1 (1997)..... 11

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is available at --- F.3d ----, 2009 WL 3416227, and is reprinted in the Appendix to the Petition ("App.") at 1a-20a. The district court's opinion is available at 2008 WL 544877 and is reprinted at App. 47a-72a.

JURISDICTION

The court of appeals issued its decision on July 23, 2009. App. 21a-22a. On October 26, 2009, the court issued an amended decision and denied a petition for rehearing and rehearing en banc. App. 1a-20a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "No person shall be deprived of life, liberty, or property without due process of law."

INTRODUCTION

The court of appeals in this case affirmed an award of nearly $20 million in punitive damages based on an accounting dispute that resulted in $1 million in compensatory damages for purely economic harm. The court refused to review the award to determine whether it was excessive under this Court's due process precedents. *See* App. 14a, 69a.

Had that award been imposed by any court or jury, the court of appeals would have been required to reverse it. This Court has repeatedly held that the Constitution prohibits the imposition of "grossly excessive or arbitrary punishments on a tortfeasor," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), and that awards of punitive damages must be subject to meaningful judicial review, *see Honda Motor Co. v. Oberg*, 512 U.S. 415, 418, 430-34 (1994); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626-28 (2008). Critically, the Court has explained that where, as here, "compensatory damages are substantial," an award "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *see Exxon Shipping*, 128 S. Ct. at 2633. It is unacceptable in such a case for "punitive damages [to] dwarf the corresponding compensatories." *Exxon Shipping*, 128 S. Ct. at 2625. The arbitration panel's nearly $20 million punitive damages award based on $1 million in compensatory damages exceeds the 1:1 constitutional limit by a factor of 20, and plainly "dwarf[s] the corresponding compensatories." Accordingly, if awarded by a court or a jury, it could not possibly be sustained.

Because the punitive damages in this case were awarded by an arbitration panel, however, the district court and court of appeals concluded that "due process does not apply," and the punitive damages awarded by the arbitrators accordingly could not be "vacate[d] . . . based on their excessiveness." App. 14a, 69a. The court of appeals' decision directly conflicts with decisions of other courts that have held that arbitral awards of punitive damages are subject

to the constraints of due process. The court of appeals' decision also cannot be squared with this Court's state action precedents. An arbitral award in which the arbitrators exercise power to inflict punishment to further public policy goals constitutes state action subject to constitutional constraints when the award is confirmed and enforced as a judgment of a court.

By granting arbitrators virtually unbridled power to punish individuals involved in purely economic disputes, the court of appeals' decision also leads to intolerable consequences. In this case, the arbitration panel imposed a grossly excessive $20 million award of punitive damages. But under the court of appeals' decision, it could just as easily have imposed with impunity a $40 million award, or even a $100 million award. This Court should grant the petition to resolve the recognized division in the lower courts over whether an arbitrator has that kind of unchecked power to mete out punishment.

STATEMENT OF THE CASE

1. In the early 1990s, petitioners, the founders of Cisco Systems, Inc., began searching for a money manager to oversee their investments. Excerpts of Record ("ER") 234. In 1992, petitioners hired respondent Soward as their investment manager and entrusted him with control over nearly all their assets. ER 234-35. To carry out petitioners' investment strategy, petitioners created & Capital Partners, L.P., a partnership in which respondent served as general partner and petitioners served as limited partners. *Id.* Petitioner Bosack and respondent later formed Cartesian, an investment partnership in

which respondent once again served as general partner. ER 75, 235, 244.

In late 2003, after respondent requested an increase in compensation, petitioners retained an accounting firm to conduct an audit of their investments. The audit revealed that respondent had (i) taken more than $5 million in distributions from & Capital in violation of the partnership agreement, and (ii) made more than $1 million in loans from & Capital to himself and to colleagues without written documentation. ER 113, 119, 176-77. Concerned that respondent would abscond with their funds, petitioners instructed their lawyer to send a letter terminating him as their money manager and removing him as general partner of & Capital and Cartesian. ER 2, 120, 177.

In February 2004, respondent filed a demand for arbitration, asserting claims against petitioners for breach of contract and breach of the covenant of good faith and fair dealing. ER 138-58. In July 2004, petitioners brought an action in the United States District Court for the Western District of Washington, asserting claims against respondent for fraud, breach of fiduciary duty, negligent misrepresentation, breach of contract, and conversion. ER 30-58. Upon respondent's motion, the district court stayed petitioners' action pending the resolution of respondent's arbitration claims. ER 180-91. Following that decision, petitioners agreed to have their claims against respondent determined as part of the arbitration. ER 192-218; 237.

2. The arbitration proceeded in stages, resulting in five interim awards and a final award. ER 226-

29; *see* App. 5a-6a. In March 2006, the arbitral panel permitted respondent to amend his demand for arbitration and add claims for conversion and breach of fiduciary duty—tort claims that, for the first time, provided a basis for respondent to seek punitive damages in the case. *See* ER 386.

In Awards 1 and 2, the arbitrators found that respondent had committed multiple breaches of fiduciary duty in his dealings with petitioners, and awarded petitioners approximately $1.9 million in compensatory damages. App. 6a; ER 1004-05. In Award 3, the arbitrators addressed respondent's heavily disputed claim for an accounting of his interest in Cartesian and found that the interest was worth approximately $1.46 million as of September 30, 2006. Petitioner promptly paid that amount, plus interest, two days after Award 3 issued. App. 54a; ER 363, 385-86. In Award 4, however, the arbitrators found that respondent was entitled to the distribution of his partnership interest in Cartesian a reasonable time after he was removed as general partner in late 2003 and that the failure to make the payment at that time rendered petitioners liable for conversion of respondent's partnership interest and breach of fiduciary duty. Based on those findings, the arbitrators awarded respondent compensatory damages of $1,001,101, the value of his interest in Cartesian at the time the arbitrators found payment should have been made. ER 396, 400, 403-05. The arbitrators deemed those damages (for which petitioners were jointly and severally liable) already satisfied by the payment of the amount found due on respondent's accounting claim in Award 3. ER 404-05.

Even though the damages determined in Award 4 had already been satisfied, they became the basis for the arbitrators' imposition of punitive damages in Award 5. At respondent's urging, the arbitrators deemed petitioners' conduct "throughout the period commencing with the firing of Soward in November 2003 through the end of testimonial hearings in this matter," ER 796, 952, to be worthy of punishment. ER 955. The arbitrators awarded respondent nearly $20 million in punitive damages against petitioners for respondent's $1 million of economic injury: $10,999,494 against petitioner Bosack and $8,555,162 against his wife, petitioner Lerner. ER 956-57.

3. Petitioners filed a motion in the district court seeking to vacate Awards 4 and 5. Petitioners argued, among other things, that "the punitive damages award [imposed by the arbitrators] is excessive and violates their [right to] due process." App. 69a. The district court rejected petitioners' argument, concluding that, "[b]ecause due process does not apply to arbitration awards, the Court cannot vacate the awards based on their excessiveness." *Id.* (citing *Barnes v. Logan*, 122 F.3d 820, 824 (9th Cir. 1997); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943, F.2d 1056, 1063-64 (9th Cir. 1991)).

4. The court of appeals affirmed. Petitioners argued that "the panel's award [of punitive damages] is presumptively unconstitutional" because it "exceed[ed] a 1:1 ratio" and "none of the guideposts identified by [this Court] in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), justify such an excessive award." App. 14a. The court of appeals rejected that argument. The court "agree[d]" with the dis-

trict court that due process does not apply to arbitral awards, and that it therefore "could not vacate the arbitration award for excessiveness." *Id.* at 14a. Having rejected the claim that it could review the award for excessiveness, the court of appeals affirmed the award based on nothing more than a determination that the arbitrators had "discussed and then applied both *State Farm* and *BMW*." *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

Federal and state courts have divided on the question whether an arbitral award of punitive damages is subject to constitutional constraints on excessiveness. Some courts, like the court of appeals below, have concluded that those awards are not subject to constitutional limits on excessiveness. Other courts have rejected that conclusion, determining that the limits of due process apply.

The question whether arbitral awards of punitive damages are subject to due process limits is a recurring issue of national importance. The decision of the court of appeals below would afford arbitrators virtually unchecked power to mete out whatever punishment they choose when, as is usually the case, the arbitration agreement does not expressly bar an award of punitive damages. That decision cannot be squared with this Court's decisions concerning the circumstances in which nominally private conduct is subject to constitutional constraints. And because the 20:1 award in this case could not possibly be sustained under this Court's constitutional excessiveness decisions, this case presents a highly suitable vehicle for resolving the conflict in the lower courts.

This Court therefore should grant review and reverse the decision below.

A. FEDERAL AND STATE COURTS ARE IN CONFLICT OVER WHETHER ARBITRAL AWARDS OF PUNITIVE DAMAGES ARE SUBJECT TO CONSTITUTIONAL DUE PROCESS LIMITS

1. The lower federal and state courts are in conflict on the question whether arbitral awards of punitive damages are subject to the constitutional constraints of due process. The court below held that an arbitral award of punitive damages is not subject to the constraints of due process and thus cannot be vacated for excessiveness. App. 14a, 69a.

Other courts agree with that conclusion. For example, the Eleventh Circuit has rejected the argument that there must be "judicial review for excessiveness before an arbitral award of punitive damages can be confirmed," and held that "[n]either the [award of] punitive damages [by the arbitrators] itself nor the confirmation of the award by the district court constitute sufficient state action to trigger the application of due process mandates." *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190, 1196 (11th Cir. 1995).

The Supreme Court of Connecticut reached the same conclusion in *MedValUSA Health Programs, Inc. v. Memberworks, Inc.*, 872 A.2d 423, 428 (Conn. 2005), *cert. denied*, 546 U.S. 960 (2005). Although the court recognized that courts had taken different positions on the question, *see id.* at 434-35, the court ultimately concluded that "an arbitration award does

not constitute state action and is not converted into state action by the trial court's confirmation of the award." *Id.* at 428. It therefore held that "an arbitration panel's award of punitive damages does not implicate the due process clause, regardless of how excessive the award may be." *Id.* Two justices in dissent would have held that the state had "a well-defined and dominant public policy against grossly excessive punitive damage awards" and would have enforced that policy by "apply[ing] the three guideposts set forth in *Gore*." *Id.* at 451 (Zarella, J., joined by Norcott, J., dissenting). The court disagreed, affirming an arbitral award of $5 million in punitive damages even though the arbitrators had refused to award any compensatory damages because the plaintiffs had "failed to establish [them] with reasonable certainty." *Id.* at 427-28.

The court in *Porush v. Lemire*, 6 F. Supp. 2d 178 (E.D.N.Y. 1998), took the same approach. Relying on the Eleventh Circuit's decision in *Davis*, it rejected the argument that an "arbitral award of punitive damages violate[d] [the party's] right to due process under the Fifth and Fourteenth Amendments," stating that "private arbitrators are not state actors and, absent state action, there can be no violation of either amendment." *Id.* at 186.

2. In conflict with those decisions, other courts have held that arbitral awards are subject to due process excessiveness limits. In *Birmingham News Co. v. Horn*, the Alabama Supreme Court squarely "h[e]ld[] . . . [that] punitive-damage awards . . . constitute State action subject to review for violation of the Due Process Clause of the United States Constitution." 901 So. 2d 27, 75 (Ala. 2004) (Johnstone, J.,

concurring) (expressing reservations about the holding), *overruled on other grounds*, *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 379 (Ala. 2009). Rejecting an argument that it should apply the Eleventh Circuit's contrary decision in *Davis*, the Alabama Supreme Court "readily perceive[d] the requisite state action underlying" the district court's confirmation of the award, and it concluded that the state action was "sufficient to justify [its] review of the awards under governing federal due-process considerations." *Horn*, 901 So. 2d at 66.

Additionally, in *Sawtelle v. Waddell & Reed, Inc.*, the New York Supreme Court, Appellate Division, in a ruling that the New York Court of Appeals declined to review, held that "*Gore* provides the appropriate standard in determining the excessiveness of an arbitration award of punitive damages." 304 A.D.2d 103, 109-10, 117-18 (N.Y. App. Div. 2003), *appeal after remand*, 21 A.D.3d 820 (N.Y. App. Div. 2005), *leave to appeal dismissed*, 843 N.E.2d 1158 (N.Y. 2005). The court accordingly engaged in "a separate and independent analysis to determine whether the arbitrator's award was excessive under the *Gore* standard," *Sawtelle*, 304 A.D.2d at 110; *see id.* at 110-11. Because the award "r[an] afoul" of the due process limits set forth in that case, the court vacated it. *Id.* at 111.

The district court for the Eastern District of New York took a similar approach in *Sanders v. Gardner*, 7 F. Supp. 2d 151 (1998). In that case, the court concluded that "the Arbitrators' . . . aggregate punitive damages award was constitutionally sound" after engaging in an extensive analysis of the limitations set forth in this Court's opinions in *Gore*, *Pacific Mu-*

tual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). *Sanders*, 7 F. Supp. 2d at 176-79.

And in *Knepp v. Credit Acceptance Corp.*, a bankruptcy court, although "bound by the precedent in the Eleventh Circuit . . . in *Davis*" to hold that "the Due Process rights of the [challenging party] ha[d] not been denied," likewise determined that "scholarly articles" concluding that "contractually compelled arbitration can be state action for constitutional purposes" had "correctly address[ed] the issue." 229 B.R. 821, 840, 841 (Bankr. N.D. Ala. 1999) (citing Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 609 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 44 (1997)). The court concluded that "arbitration amounts to the privatization of our judicial system" and should be subject to due process review. *Id.* at 828; *see id.* at 840-41.

3. The end result of the disarray in lower courts is that a party's federal constitutional rights depend entirely on the forum in which a party seeks to confirm or vacate an arbitral award. Individuals who arbitrate in a proceeding reviewed in Connecticut state court have no recourse when faced with an excessive punitive damages award, "regardless of how excessive the award may be," *MedValUSA*, 872 A.2d at 428. In the neighboring state of New York, in contrast, the appellate court will engage in an inde-

pendent review under the principles this Court established in *Gore* and its progeny. *Sawtelle*, 301 A.D.2d at 109-10. Parties in Alabama are also entitled to due process protection against excessive arbitral punitive damages awards—but only if they seek to confirm or vacate an award in state, and not federal, courts. *Compare Horn*, 901 So. 2d at 66-67 (perceiving "requisite state action" sufficient to justify federal due process review of arbitral awards), *with Davis*, 59 F.3d 1186, 1191 ("[S]tate action element of a due process claim is absent in private arbitration cases."). The applicability of the demands of the Constitution should not turn on geography or forum in this manner. The current disparity in treatment warrants this Court's review.

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

Standard arbitration agreements authorize an arbitrator to resolve "all disputes" and are generally construed to authorize an award of punitive damages. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995). The question presented in this case can therefore potentially arise in virtually any dispute arbitrated under standard arbitration agreements.

The question presented is also of critical importance. Under the court of appeals' decision, any party who has entered into such an agreement is exposed to an arbitrator's virtually unchecked power to impose punishment for nothing more than ordinary commercial conduct. This case illustrates the conse-

quences of that approach. The arbitrators imposed a $20 million punitive damages award based on purely economic harm in the amount of $1 million. Such an award exceeds by roughly 20 times the amount that any court or jury could have imposed. And under the court of appeals' decision, nothing would have stopped the arbitrators from multiplying many times that already excessive award.

The decision not only has intolerable effects on persons subjected to such excessive punishment; it also will affect parties considering whether to arbitrate in the first instance. If, as the court of appeals ruled in this case, arbitrators are "free to issue large punitive damage awards without any prospect of meaningful judicial review," that will provide "a powerful disincentive to arbitration" and "undermine its vital role as a dispute resolution alternative." Edward Wood Dunham, *Are There Due Process Limits on Arbitral Punitive Damage Awards?*, 23 Franchise L.J. 3, 3 (2003). Parties' reluctance to engage in arbitration will, in turn, have a significant impact on state and federal judiciaries, who will find themselves adjudicating many disputes that previously would have been arbitrated.

This case presents a highly suitable vehicle for resolving the conflict over the question presented. The decision below is the latest in a series of opinions in which the Ninth Circuit has refused to review arbitral awards of punitive damages for excessiveness. The court of appeals refused to hear the matter en banc. And it affirmed an award of punitive damages that would certainly have been found constitutionally excessive had it been awarded by a

court or a jury. This Court's review therefore is warranted.

C. THE COURT OF APPEALS ERRED IN HOLDING THAT AN ARBITRAL AWARD OF PUNITIVE DAMAGES IS NOT SUBJECT TO DUE PROCESS EXCESSIVENESS LIMITS

The court of appeals erred in "agree[ing]" with the district court that due process does not apply to arbitral awards, and that it therefore "could not vacate the arbitration award for excessiveness." App. 14a, 69a. As a number of courts and commentators have explained, an arbitral award of punitive damages, when confirmed by a court, constitutes state action and thus is subject to due process constraints. *See* pp. 9-11, *supra*. The court of appeals' decision to the contrary cannot be squared with this Court's precedent.

This Court has "treated a nominally private entity as a state actor" subject to the dictates of due process when the actor "has been delegated a public function by the State." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (internal quotation marks omitted). State action also exists when private action could not take effect without the "overt, significant assistance" of the government. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991). Under those decisions, an arbitrator's imposition of punitive damages, when confirmed by and made a judgment of a court enforceable like any other judgment, constitutes state action subject to constitutional constraints.

In awarding punitive damages, arbitrators necessarily perform a public function. Indeed, as this Court has recognized, the entire point of punitive damages is to serve the public functions of retribution and deterrence—the same "interests advanced by the criminal law." *Exxon Shipping*, 128 S. Ct. at 2621, 2628. Moreover, an arbitrator's imposition of punitive damages cannot take effect without significant overt assistance from the government. In particular, a disputed arbitral award of punitive damages cannot be enforced until the court confirms it as a binding judgment. Thus, just as there is state action when a court enforces a discriminatory peremptory challenge, so too is there state action when a court enforces an arbitral award of punitive damages. *See Edmonson*, 500 U.S. at 622. The court of appeals therefore erred in holding that the arbitrators' imposition of a $20 million punishment was not subject to the constraints of due process.

Nor is the court of appeals' constitutional error redeemed by its subsequent conclusion that the arbitrator did not act in manifest disregard of this Court's excessiveness precedents. Under this Court's punitive damage precedents, there must be "meaningful and adequate judicial review" of an award of punitive damages. *Honda Motor*, 512 U.S. at 418; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (allowing arbitration of statutory claim where judicial review of the award was "sufficient to ensure that arbitrators comply with the requirements of the statute" (internal quotation marks omitted)). The court of appeals' version of the manifest disregard standard was neither "meaningful" nor "adequate." In particular, the

court of appeals simply asked whether the arbitrators identified and purported to apply the Court's excessiveness precedents. It did not ask whether the arbitrators' ultimate award so far deviated from what this Court's precedents require as to constitute a manifest disregard of them. Whether or not the court of appeals' formulation of the manifest disregard standard is sufficient to ensure that arbitrators do not act in excess of their authority in other contexts, it plainly does not satisfy the constitutional standard of "meaningful" and "adequate" review of an award of punitive damages. Under that approach, an arbitrator could award any level of punitive damages, *no matter how excessive*, so long as the arbitrator incanted this Court's decisions and purported to apply them. That is precisely what happened here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL H. BROMBERG
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Suite 560
Redwood Shores, CA 94065

FRED G. BENNETT
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

STEVEN L. SMITH
ROBIN E. DEVAUX
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

December 10, 2009

APPENDIX

APPENDIX A

9TH CIRCUIT AMENDED OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of The Arbitration Between, Leonard Bosack; Sandy Lerner; Cartesian Partners LP; The Leonard Bosack Trust; The Sandy Lerner Trust; Richard Troiano; The & Trust; & Capital Partners; The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc.; Capital Inc., *Petitioners-Appellants*, v. David C. Soward; & Management Company, *Respondents-Appellees*.	No. 08-35248 D.C. No. 2:07-cv-00574-TSZ

In the Matter of The Arbitration Between,

Leonard Bosack; Sandy Lerner; Cartesian Partners LP; The Leonard Bosack Trust; The Sandy Lerner Trust; Richard Troiano; The & Trust; & Capital Partners; The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc.; Capital Inc.,

Petitioners-Appellants,

v.

David C. Soward; & Management Company,

Respondents-Appellees.

No. 08-35458
D.C. No.
2:07-cv-00574-TSZ

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly,
Senior District Judge, Presiding

Argued and Submitted
June 4, 2009—Seattle, Washington

Filed July 23, 2009
Amended October 26, 2009

Before: William C. Canby, Jr.,
David R. Thompson and
N. Randy Smith, Circuit Judges.

COUNSEL

Kathleen M. Sullivan, Redwood Shores, California, for the appellant, Bosack.

Steven Smith, San Francisco, California, for the appellant, Lerner.

J. Daniel Sharp, San Francisco, California, for the appellees.

ORDER

The slip opinion filed July 23, 2009 is amended as follows:

At slip opinion page 9514, line 25, after <did not disregard or ignore these cases.> insert <Nor did the panel improperly interpret these cases "to render [them] inapplicable to this case." *Comedy Club II*, 553 F.3d at 1293. Its decision does not, therefore, amount to manifest disregard for the law. See, e.g., id.; *Kyocera*, 341 F.3d at 1003.> At slip opinion page 9514, line 25, through page 9515, line 13, delete <Whether the panel misinterpreted . . . would amount to manifest disregard of the law.>

At slip opinion page 9514, line 25, through page 9515, line 13, delete <Whether the panel misinterpreted . . . would amount to manifest disregard of the law.>

With these amendments, the panel of Judges Canby, Thompson and N. Randy Smith has voted

unanimously to deny petitioners' petition for rehearing. Judge N. Randy Smith has also voted to deny the petitioners' petition for rehearing by the court en banc, and Judges Canby and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. *See* Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

No further petitions for panel rehearing or for rehearing en banc will be accepted for filing.

OPINION

THOMPSON, Senior Circuit Judge:

Leonard Bosack ("Bosack") and Sandy Lerner ("Lerner") entered into arbitration with their former financial manager, David C. Soward ("Soward") to resolve multiple disputes arising out of the parties' soured relationship.

The panel of arbitrators ("panel") made several interim awards, one of which was final, and one Final Award. Soward prevailed on his conversion and tort claims, and was awarded substantial compensatory and punitive damages as well as attorney fees and costs. The district court confirmed the award. Bosack and Lerner appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

BACKGROUND

Bosack and his wife Lerner were the founders of Cisco Systems. They employed Soward as their investment manager. The three formed & Capital Partners, L.P., ("& Capital"). Soward served as the general partner, and Bosack and Lerner were limited partners.

Several years later, Bosack and Soward formed Cartesian, a second partnership, for the purpose of managing Bosack's "high touch" investments. Soward was the general partner of Cartesian; Bosack was a limited partner. A written partnership agreement for Cartesian (the "Wood Agreement") was drafted, but never signed.

A decade or so later, Bosack and Lerner began to suspect Soward had breached his fiduciary duties in managing their assets. They discovered that Soward had made undocumented loans to himself and his friends. Soward was removed as the general partner of & Capital, and of Cartesian. Bosack and Lerner then formed SLLB, L.L.C., and it replaced Soward as the general partner of Cartesian.

Soward demanded arbitration, seeking (among other things) a dissolution of Cartesian and an accounting of his partnership interest. Bosack and Lerner participated with Soward in the arbitration proceeding. It lasted two years, during which more than sixty days of hearings were held, more than twenty witnesses testified, and over five hundred exhibits were entered into evidence. Due to the complicated nature of the proceedings, the parties agreed to proceed in stages. The panel entered a

series of five interim awards, and then one Final Award.

The results of the awards were mixed. In Interim Award 1, the panel determined that the terms of the Wood Agreement governed the Cartesian partnership, though that agreement had never been signed. The panel determined that Soward breached his fiduciary duties, but that Bosack had no right to remove him as a general partner of Cartesian. Under the terms of the Wood Agreement, the panel held that Soward remained a limited partner in Cartesian after he was removed as the general partner. The panel concluded that the value of Soward's partnership should be calculated as of September 30, 2006. Interim Award 1 was not made final.

Interim Award 2 is not involved in this appeal.

In Interim Award 3, the panel determined the value of Soward's partnership interest was $1,496,391. Award 3 was the only interim award the arbitration panel made final and immediately enforceable.

In Interim Award 4, the panel ruled in favor of Soward on two tort claims. After Bosack removed Soward as the general partner of Cartesian, the panel determined that, under Delaware law, Soward was entitled to an accounting and a prompt distribution of his partnership interest. The panel found that Bosack had breached his fiduciary duties to Soward by failing to provide him with an accounting and distribution, and by improperly taking control of all the Cartesian assets. The panel

also found Bosack and Lerner liable for conversion by their improper appropriation of Soward's interest in Cartesian. Damages awarded under Interim Award 4 were subject to a credit for payments made to satisfy Interim Award 3.

In Interim Award 5, the panel ruled that Bosack and Lerner had "acted with malice and oppression," and that Soward was entitled to punitive damages of $10,999,494 against Bosack, and $8,555,162 against Lerner.

Bosack and Lerner moved the district court to vacate Interim Awards 4 and 5, as well as the panel's Hearing Order No. 49 (finding that punitive damages applied). They also asked the district court to vacate the Final Award as to Soward's tort claims and punitive damages, and the award of related costs and attorney fees. The district court denied that motion and confirmed the panel's Final Award, which incorporated its earlier interim awards.

STANDARD OF REVIEW

We review de novo the district court's confirmation of the Final Award entered by the arbitration panel. *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009) (hereinafter "*Comedy Club II*"). Our review is limited by the Federal Arbitration Act ("FAA"), which "enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award." *Kyocera Corp. v. Prudential- Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003). "Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court

review of an arbitral award under the statute, which is unambiguous in this regard." *Id.* Under § 9 of the FAA[1], "a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11." *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (citing 9 U.S.C. § 10(a)).

DISCUSSION

Bosack and Lerner argue Awards 4 and 5, and the portion of the Final Award confirming those awards, should be vacated because: (1) the panel allegedly violated Rule 46 of the Commercial Arbitration Rules of the American Arbitration Association ("Rule 46") and the *functus officio* doctrine, (2) the panel manifestly disregarded the law, and (3) the appealed awards are completely irrational. They also appeal the award of attorney fees and costs.

I

[1] Rule 46 provides that "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." This rule essentially codifies the common law doctrine of *functus officio*, which "forbids an arbitrator to redetermine an issue which he has already decided." *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982) (quoting *La Vale Plaza, Inc. v. R.S. Norman, Inc.*, 378 F.2d 569, 573 (3d Cir.

---

[1] Unless otherwise noted, all subsequent statutory citations refer to the FAA.

1967)). We include both Rule 46 and *functus officio* in our references to *functus officio*.

A

[2] Before determining whether the arbitrators violated the *functus officio* doctrine, we must first address a threshold question: whether or not the *functus officio* doctrine may be applied to an interim award. This is a question of first impression in our circuit.

[3] The Eighth Circuit has held that an interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final. *See, e.g.*, *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999). We adopt the criteria used by the Eighth Circuit, and apply them to the instant case.

Only Interim Award 3 satisfies the criteria for finality. The panel explicitly stated that Interim Awards 1, 2, 4, and 5 were not final. Furthermore, as the district court correctly found, the panel expressly reserved jurisdiction over all issues (with the exception of the accounting performed in Award 3) until issuance of the final award. Of the five interim awards, only Award 3 was expressly made final. Thus, only Award 3 may be deemed final for purposes of the *functus officio* doctrine.

B

Under either Rule 46 or the *functus officio* doctrine, Bosack and Lerner's argument boils down to the same core contention: they contend the panel

exceeded its authority by re-determining the merits of Award 3 in Award 4. They claim that in Award 3, the panel ruled that Soward remained a partner in Cartesian through September 2006. They argue that the panel "ignored and contradicted" this ruling in Award 4 by finding that Soward ceased being a Cartesian partner in November 2003.

[4] Bosack and Lerner mischaracterize the scope of Award 3. The finding that Soward remained a partner was made in Award 1, not in Award 3.[2] In Awards 1 and 2, the panel determined that the Wood Agreement controlled the Cartesian partnership, and determined that an accounting was required to determine the value of Soward's partnership interest. Award 3 was limited in scope: its only purpose was to determine the value of Soward's interest in Cartesian, according to the terms of the Wood Agreement.

[5] In Award 4, the panel ruled on Soward's claims for breach of fiduciary duty and for conversion.[3] The panel did not revisit its decision in Award 3 or modify the accounting or its determination of the value of Soward's partnership interest. The panel did not re-determine the merits of Award 3. Accordingly, neither the *functus officio* doctrine nor Rule 46 applies.

---

[2] Award 1 was not final. Thus, even if Awards 4 and 5 did modify the panel's determination in Award 1 that Soward remained a Cartesian partner, such modification was permissible.

[3] Under California law, a plaintiff "may plead cumulative or inconsistent causes of action" in connection with the wrongful repudiation of a partnership agreement. *Gherman v. Colburn*, 72 Cal. App. 3d 544, 564-565 (Cal. Ct. App. 1977).

II

Bosack and Lerner also contend that Awards 4 and 5 were issued in manifest disregard of the law.

Section 10(a)(4) of the FAA provides that a court may vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Arbitrators exceed their powers when they express a "manifest disregard of law," or when they issue an award that is "completely irrational." *Comedy Club II*, 553 F.3d at 1290 (citing *Kyocera*, 341 F.3d at 997). "[F]or an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator [ ] recognized the applicable law and then ignored it.' " *Comedy Club II*, 553 F.3d at 1290 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995)) (alterations in *Comedy Club II*).

A

Lerner contends that Award 4 violates California law, because the panel failed to find that she personally exercised control over Soward's interest in Cartesian.[4]

---

[4] Lerner also contends that the panel exceeded its authority in finding her liable for conversion in Award 4. She argues that in order to find her liable for conversion, the panel had to pierce SLLB's corporate veil. In her brief on appeal, Lerner argues that because Soward never specifically raised a veil-piercing argument, the panel could not find her liable for conversion. This argument is meritless. The issue of whether Lerner was liable for the conversion of Soward's interest in Cartesian was clearly before the panel.

[6] Lerner's argument, in essence, amounts to an invitation to review the panel's factual findings and legal conclusions. We are prohibited from doing so. "Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard." *Kyocera*, 341 F.3d at 994.

[7] Arbitrators are not required to set forth their reasoning supporting an award. *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled in part on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). An arbitrators' "award may be made without explanation of their reasons and without a complete record of their proceedings[.]" *Id.* at 436. "If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000). Even if, as Lerner argues, the arbitrators failed to make an explicit finding that she exercised personal control over Soward's assets, this does not warrant vacatur.

[8] Furthermore, "manifest disregard . . . requires 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law.'" *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (quoting *San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)). "[T]o demonstrate manifest disregard, the moving party must show that the arbitrator 'understood and correctly state[d] the law, but proceed[ed] to disregard the

same." *Collins*, 505 F.3d at 879 (quoting *San Martine Compania De Navegacion*, 293 F.2d at 801) (alterations in *Collins*). "[T]here must be some evidence in the record, other than the result, that the arbitrators were aware of the law and intentionally disregarded it." *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004). Lerner has failed to point to any evidence of this in the record.

B

Lerner also contends the panel violated § 3294(a) of the California Civil Code by awarding punitive damages against her, in the absence of "clear and convincing evidence" that she acted with "oppression, fraud, or malice."

[9] Lerner's argument is not supported by the record. The panel specifically found that "Lerner . . . acted with the intention of hurting Soward," and that there was "clear and convincing evidence that . . . Lerner . . . acted with malice and oppression toward Soward." Under California law, these findings could properly form the basis for an award of punitive damages. *See* Cal. Civ. Code § 3294(a).

[10] Whether or not the panel's findings are supported by the evidence in the record is beyond the scope of our review. *See, e.g., Kyocera*, 341 F.3d at 994; *Coutee v. Barrington Capital Group, L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003). The panel is not required to provide support for its findings in its awards, or to explain its conclusions. *Wilko*, 346 U.S. at 436. We "have no authority to re-weigh the

evidence" presented to the arbitration panel. *Coutee*, 336 F.3d at 1134.

C

[11] Lerner and Bosack also challenge the constitutionality of the punitive damage awards. They argue that because the compensatory damages assessed against them were "substantial," under State Farm *Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), due process dictates that the punitive damages should not exceed a 1:1 ratio. They contend that the panel's award is presumptively unconstitutional, and that none of the guideposts identified by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), justify such an excessive award. The district court rejected this argument, and held that it could not vacate the arbitration award for excessiveness. We agree.

[12] Bosack and Lerner argue that they are not seeking review of the award simply because it is excessive, but because it was issued in manifest disregard of controlling Supreme Court precedent, and therefore the arbitrators exceeded their powers. Once again, however, Bosack and Lerner have failed to show that the panel demonstrated a manifest disregard of the law in issuing the award. The panel extensively discussed and then applied both *State Farm* and *BMW*. Contrary to Bosack and Lerner's argument, the panel did not disregard or ignore these cases. Nor did the panel improperly interpret these cases "to render [them] inapplicable to this case." *Comedy Club II*, 553 F.3d at 1293. Its decision does not, therefore, amount to manifest disregard for the law. *See, e.g., id.*; *Kyocera*, 341 F.3d at 1003.

D

Finally, Bosack and Lerner argue that the panel violated California law by awarding punitive damages against them for their conduct during the arbitration proceedings.

[13] Absent an abuse of process or malicious prosecution, "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d 708, 730 (Cal. Ct. App. 2001).

[14] Given the language of Award 5, we cannot say that the arbitrators based the decision regarding punitive damages on the parties' conduct in court or during the arbitration proceedings. In Award 5, the panel explicitly stated that it was basing its awards of punitive damages on Bosack and Lerner's actions, which, "repeated over time," constituted a "planned, malicious, [and] purposeful attempt" to convert Soward's interest in Cartesian. The panel punished Bosack and Lerner for their conduct by which they accomplished their conversion, not for their conduct during arbitration.

III

Finally, Bosack and Lerner argue that Awards 4 and 5 should be vacated because they are irrational.

A

[15] An award may be vacated if it is "completely irrational." *Comedy Club II*, 553 F.3d at 1288. This "standard is extremely narrow and is satisfied only 'where [the arbitration decision] fails to draw its essence from the agreement.' " *Id.* (citing *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001)) (alterations in *Comedy Club II*).

An award "draws its essence from the agreement if the award is derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions." *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005); *see also Coast Trading Co., Inc., v. Pac. Molasses Co.*, 681 F.2d 1195, 1197 (9th Cir. 1982) (holding that an "arbitrator is confined to the interpretation and application of the parties' agreement" and that an "award is legitimate only so long as it draws its essence from the . . . agreement") (quoting *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (internal quotation marks omitted)). Under this standard of review, we do not "decide the rightness or wrongness of the arbitrators' contract interpretation, only whether the panel's decision 'draws its essence' from the contract." *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1024 (9th Cir. 1991) (quoting *New Meiji Market v. United Food & Comm'l Workers Local Union 905*, 789 F.2d 1334, 1335 (9th Cir. 1986)). We will not vacate an award simply because we might have interpreted the contract differently. *Id.*

B

[16] Bosack and Lerner contend that Awards 4 and 5 are completely irrational because they are "irreconcilable" with Awards 1 and 3, and Award 4 is "internally incoherent." Even assuming Lerner and Bosack are correct that the awards are based on contradictory findings of fact, this argument is beyond our scope of review. Under the "completely irrational" doctrine, the question is whether the award is "irrational" with respect to the contract, not whether the panel's findings of fact are correct or internally consistent. *See, e.g., Comedy Club II*, 553 F.3d at 1288; *Hoffman*, 236 F.3d at 462.

[17] Bosack and Lerner have failed to cite a single case in which we or any other court of appeal vacated an award because the factual findings were contradictory. We have repeatedly held that an award may not be vacated even where there is a clearly erroneous finding of fact. *See, e.g., Kyocera*, 341 F.3d at 1003 ("The risk that arbitrators may . . . make errors with respect to the evidence on which they base their rulings[ ] is a risk that every party to arbitration assumes, and such . . . *factual errors lie far outside the category of conduct embraced by § 10(a)(4).*") (emphasis added). Thus, even if the panel erred by making contradictory findings of fact, this does not render the decision completely irrational.

C

Bosack and Lerner also contend that Award 4 is completely irrational because the Panel ignored controlling terms of the Wood Agreement. Specifically, Bosack and Lerner argue that Award 4 was issued in violation of §§ 2.3 and 8.4 of the Wood

Agreement, which govern the winding up of the partnership. In contrast to the argument raised above, this argument comes squarely within the scope of the completely irrational doctrine. *See, e.g., Comedy Club II*, 553 F.3d at 1288; *Hoffman*, 236 F. 3d at 462.

Section 8.4 of the Wood Agreement provides that any change in the General Partner's status (other than a transfer of his partnership interest) will convert the General Partner's interest into a limited partnership interest. Pursuant to this section, the panel held in Award 1 that Soward's status reverted from general partner to limited partner when Bosack removed him in November 2003.

In Award 4, the panel found that Bosack's actions effected a dissolution of the partnership under Delaware law. Bosack and Lerner contend that this finding conflicts with § 2.3 of the Wood Agreement, which provides that no general or limited partner has the right to terminate or dissolve the partnership.

Bosack and Lerner also contend that the panel disregarded the terms of the Wood Agreement by finding that Soward was entitled to an accounting. Section 2.3 of the Wood Agreement states that no partner is entitled to demand or receive the return of his capital contribution.

[18] Had the panel found that Soward was entitled to an accounting and a distribution under the terms of the Wood Agreement, or that the Agreement mandated the dissolution of the partnership, Bosack and Lerner might be correct.

But the panel did not find that Soward was entitled to the relief accorded him in Awards 4 and 5 under the terms of the Wood Agreement. Instead, the panel found that Soward was entitled to an accounting and distribution *under Delaware law*. Similarly, the panel found that under Delaware law Bosack's actions terminated the partnership. The Wood Agreement itself provides that Delaware law controls. Accordingly, the panel's findings and conclusions in Award 4 are not inconsistent with the terms of the Wood Agreement, and are not "completely irrational."

IV

[19] Bosack and Lerner offer no argument challenging the award of attorney fees and costs, outside of their joint contention that the award should be reversed on the merits. Because we affirm the district court's confirmation of the arbitration awards, we also affirm the award of attorney fees and costs.

CONCLUSION

In sum, Bosack and Lerner have failed to demonstrate that the panel exceeded its authority. "The risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4)." *Kyocera*, 341 F.3d at 1003. Lerner and Bosack accepted this

risk when they consented to arbitration; they cannot now claim the benefits of expanded judicial review simply because the awards were unfavorable to them.

The judgment of the district court is **AFFIRMED.**

APPENDIX B

9TH CIRCUIT ORIGINAL OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of The Arbitration Between, Leonard Bosack; Sandy Lerner; Cartesian Partners LP; The Leonard Bosack Trust; The Sandy Lerner Trust; Richard Troiano; The & Trust; & Capital Partners; The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc.; Capital Inc., *Petitioners-Appellants,* v. David C. Soward; & Management Company, *Respondents-Appellees.*	No. 08-35248 D.C. No. 2:07-cv-00574-TSZ

In the Matter of The Arbitration Between,

Leonard Bosack; Sandy Lerner; Cartesian Partners LP; The Leonard Bosack Trust; The Sandy Lerner Trust; Richard Troiano; The & Trust; & Capital Partners; The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc.; Capital Inc.,

Petitioners-Appellants,

v.

David C. Soward; & Management Company,

Respondents-Appellees.

No. 08-35458
D.C. No.
2:07-cv-00574-TSZ

OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly,
Senior District Judge, Presiding

Argued and Submitted
June 4, 2009—Seattle, Washington

Filed July 23, 2009

Before: William C. Canby, Jr.,
David R. Thompson and
N. Randy Smith, Circuit Judges.
Opinion by Judge Thompson

COUNSEL

Kathleen M. Sullivan, Redwood Shores, California, for the appellant, Bosack.

Steven Smith, San Francisco, California, for the appellant, Lerner.

J. Daniel Sharp, San Francisco, California, for the appellees.

OPINION

THOMPSON, Senior Circuit Judge:

Leonard Bosack ("Bosack") and Sandy Lerner ("Lerner") entered into arbitration with their former financial manager, David C. Soward ("Soward") to resolve multiple disputes arising out of the parties' soured relationship.

The panel of arbitrators ("panel") made several interim awards, one of which was final, and one Final Award. Soward prevailed on his conversion and tort claims, and was awarded substantial compensatory and punitive damages as well as attorney fees and costs. The district court confirmed the award. Bosack and Lerner appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

BACKGROUND

Bosack and his wife Lerner were the founders of Cisco Systems. They employed Soward as their investment manager. The three formed & Capital Partners, L.P., ("& Capital"). Soward served as the general partner, and Bosack and Lerner were limited partners.

Several years later, Bosack and Soward formed Cartesian, a second partnership, for the purpose of managing Bosack's "high touch" investments. Soward was the general partner of Cartesian; Bosack was a limited partner. A written partnership agreement for Cartesian (the "Wood Agreement") was drafted, but never signed.

A decade or so later, Bosack and Lerner began to suspect Soward had breached his fiduciary duties in managing their assets. They discovered that Soward had made undocumented loans to himself and his friends. Soward was removed as the general partner of & Capital, and of Cartesian. Bosack and Lerner then formed SLLB, L.L.C., and it replaced Soward as the general partner of Cartesian.

Soward demanded arbitration, seeking (among other things) a dissolution of Cartesian and an accounting of his partnership interest. Bosack and Lerner participated with Soward in the arbitration proceeding. It lasted two years, during which more than sixty days of hearings were held, more than twenty witnesses testified, and over five hundred exhibits were entered into evidence. Due to the complicated nature of the proceedings, the parties agreed to proceed in stages. The panel entered a

series of five interim awards, and then one Final Award.

The results of the awards were mixed. In Interim Award 1, the panel determined that the terms of the Wood Agreement governed the Cartesian partnership, though that agreement had never been signed. The panel determined that Soward breached his fiduciary duties, but that Bosack had no right to remove him as a general partner of Cartesian. Under the terms of the Wood Agreement, the panel held that Soward remained a limited partner in Cartesian after he was removed as the general partner. The panel concluded that the value of Soward's partnership should be calculated as of September 30, 2006. Interim Award 1 was not made final.

Interim Award 2 is not involved in this appeal.

In Interim Award 3, the panel determined the value of Soward's partnership interest was $1,496,391. Award 3 was the only interim award the arbitration panel made final and immediately enforceable.

In Interim Award 4, the panel ruled in favor of Soward on two tort claims. After Bosack removed Soward as the general partner of Cartesian, the panel determined that, under Delaware law, Soward was entitled to an accounting and a prompt distribution of his partnership interest. The panel found that Bosack had breached his fiduciary duties to Soward by failing to provide him with an accounting and distribution, and by improperly taking control of all the Cartesian assets. The panel

also found Bosack and Lerner liable for conversion by their improper appropriation of Soward's interest in Cartesian. Damages awarded under Interim Award 4 were subject to a credit for payments made to satisfy Interim Award 3.

In Interim Award 5, the panel ruled that Bosack and Lerner had "acted with malice and oppression," and that Soward was entitled to punitive damages of $10,999,494 against Bosack, and $8,555,162 against Lerner.

Bosack and Lerner moved the district court to vacate Interim Awards 4 and 5, as well as the panel's Hearing Order No. 49 (finding that punitive damages applied). They also asked the district court to vacate the Final Award as to Soward's tort claims and punitive damages, and the award of related costs and attorney fees. The district court denied that motion and confirmed the panel's Final Award, which incorporated its earlier interim awards.

STANDARD OF REVIEW

We review de novo the district court's confirmation of the Final Award entered by the arbitration panel. *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009) (hereinafter "*Comedy Club II*"). Our review is limited by the Federal Arbitration Act ("FAA"), which "enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award." *Kyocera Corp. v. Prudential- Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003). "Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court

review of an arbitral award under the statute, which is unambiguous in this regard." *Id.* Under § 9 of the FAA[1], "a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11." *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (citing 9 U.S.C. § 10(a)).

DISCUSSION

Bosack and Lerner argue Awards 4 and 5, and the portion of the Final Award confirming those awards, should be vacated because: (1) the panel allegedly violated Rule 46 of the Commercial Arbitration Rules of the American Arbitration Association ("Rule 46") and the *functus officio* doctrine, (2) the panel manifestly disregarded the law, and (3) the appealed awards are completely irrational. They also appeal the award of attorney fees and costs.

I

[1] Rule 46 provides that "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." This rule essentially codifies the common law doctrine of *functus officio*, which "forbids an arbitrator to redetermine an issue which he has already decided." *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982) (quoting *La Vale Plaza, Inc. v. R.S. Norman, Inc.*, 378 F.2d 569, 573 (3d Cir.

---

[1] Unless otherwise noted, all subsequent statutory citations refer to the FAA.

1967)). We include both Rule 46 and *functus officio* in our references to *functus officio*.

A

[2] Before determining whether the arbitrators violated the *functus officio* doctrine, we must first address a threshold question: whether or not the *functus officio* doctrine may be applied to an interim award. This is a question of first impression in our circuit.

[3] The Eighth Circuit has held that an interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final. *See, e.g.*, *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999). We adopt the criteria used by the Eighth Circuit, and apply them to the instant case.

Only Interim Award 3 satisfies the criteria for finality. The panel explicitly stated that Interim Awards 1, 2, 4, and 5 were not final. Furthermore, as the district court correctly found, the panel expressly reserved jurisdiction over all issues (with the exception of the accounting performed in Award 3) until issuance of the final award. Of the five interim awards, only Award 3 was expressly made final. Thus, only Award 3 may be deemed final for purposes of the *functus officio* doctrine.

B

Under either Rule 46 or the *functus officio* doctrine, Bosack and Lerner's argument boils down to the same core contention: they contend the panel

exceeded its authority by re-determining the merits of Award 3 in Award 4. They claim that in Award 3, the panel ruled that Soward remained a partner in Cartesian through September 2006. They argue that the panel "ignored and contradicted" this ruling in Award 4 by finding that Soward ceased being a Cartesian partner in November 2003.

[4] Bosack and Lerner mischaracterize the scope of Award 3. The finding that Soward remained a partner was made in Award 1, not in Award 3.[2] In Awards 1 and 2, the panel determined that the Wood Agreement controlled the Cartesian partnership, and determined that an accounting was required to determine the value of Soward's partnership interest. Award 3 was limited in scope: its only purpose was to determine the value of Soward's interest in Cartesian, according to the terms of the Wood Agreement.

[5] In Award 4, the panel ruled on Soward's claims for breach of fiduciary duty and for conversion.[3] The panel did not revisit its decision in Award 3 or modify the accounting or its determination of the value of Soward's partnership interest. The panel did not re-determine the merits of Award 3. Accordingly, neither the *functus officio* doctrine nor Rule 46 applies.

---

[2] Award 1 was not final. Thus, even if Awards 4 and 5 did modify the panel's determination in Award 1 that Soward remained a Cartesian partner, such modification was permissible.

[3] Under California law, a plaintiff "may plead cumulative or inconsistent causes of action" in connection with the wrongful repudiation of a partnership agreement. *Gherman v. Colburn*, 72 Cal. App. 3d 544, 564-565 (Cal. Ct. App. 1977).

II

Bosack and Lerner also contend that Awards 4 and 5 were issued in manifest disregard of the law.

Section 10(a)(4) of the FAA provides that a court may vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Arbitrators exceed their powers when they express a "manifest disregard of law," or when they issue an award that is "completely irrational." *Comedy Club II*, 553 F.3d at 1290 (citing *Kyocera*, 341 F.3d at 997). "[F]or an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator [ ] recognized the applicable law and then ignored it.' " *Comedy Club II*, 553 F.3d at 1290 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995)) (alterations in *Comedy Club II*).

A

Lerner contends that Award 4 violates California law, because the panel failed to find that she personally exercised control over Soward's interest in Cartesian.[4]

---

[4] Lerner also contends that the panel exceeded its authority in finding her liable for conversion in Award 4. She argues that in order to find her liable for conversion, the panel had to pierce SLLB's corporate veil. In her brief on appeal, Lerner argues that because Soward never specifically raised a veil-piercing argument, the panel could not find her liable for conversion. This argument is meritless. The issue of whether Lerner was liable for the conversion of Soward's interest in Cartesian was clearly before the panel.

[6] Lerner's argument, in essence, amounts to an invitation to review the panel's factual findings and legal conclusions. We are prohibited from doing so. "Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard." *Kyocera*, 341 F.3d at 994.

[7] Arbitrators are not required to set forth their reasoning supporting an award. *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled in part on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). An arbitrators' "award may be made without explanation of their reasons and without a complete record of their proceedings[.]" *Id.* at 436. "If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000). Even if, as Lerner argues, the arbitrators failed to make an explicit finding that she exercised personal control over Soward's assets, this does not warrant vacatur.

[8] Furthermore, "manifest disregard . . . requires 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law.'" *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (quoting *San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)). "[T]o demonstrate manifest disregard, the moving party must show that the arbitrator 'understood and correctly state[d] the law, but proceed[ed] to disregard the

same." *Collins*, 505 F.3d at 879 (quoting *San Martine Compania De Navegacion*, 293 F.2d at 801) (alterations in *Collins*). "[T]here must be some evidence in the record, other than the result, that the arbitrators were aware of the law and intentionally disregarded it." *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004). Lerner has failed to point to any evidence of this in the record.

B

Lerner also contends the panel violated § 3294(a) of the California Civil Code by awarding punitive damages against her, in the absence of "clear and convincing evidence" that she acted with "oppression, fraud, or malice."

[9] Lerner's argument is not supported by the record. The panel specifically found that "Lerner . . . acted with the intention of hurting Soward," and that there was "clear and convincing evidence that . . . Lerner . . . acted with malice and oppression toward Soward." Under California law, these findings could properly form the basis for an award of punitive damages. *See* Cal. Civ. Code § 3294(a).

[10] Whether or not the panel's findings are supported by the evidence in the record is beyond the scope of our review. *See, e.g., Kyocera*, 341 F.3d at 994; *Coutee v. Barrington Capital Group, L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003). The panel is not required to provide support for its findings in its awards, or to explain its conclusions. *Wilko*, 346 U.S. at 436. We "have no authority to re-weigh the

evidence" presented to the arbitration panel. *Coutee*, 336 F.3d at 1134.

C

[11] Lerner and Bosack also challenge the constitutionality of the punitive damage awards. They argue that because the compensatory damages assessed against them were "substantial," under State Farm *Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), due process dictates that the punitive damages should not exceed a 1:1 ratio. They contend that the panel's award is presumptively unconstitutional, and that none of the guideposts identified by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), justify such an excessive award. The district court rejected this argument, and held that it could not vacate the arbitration award for excessiveness. We agree.

[12] Bosack and Lerner argue that they are not seeking review of the award simply because it is excessive, but because it was issued in manifest disregard of controlling Supreme Court precedent, and therefore the arbitrators exceeded their powers. Once again, however, Bosack and Lerner have failed to show that the panel demonstrated a manifest disregard of the law in issuing the award. The panel extensively discussed and then applied both *State Farm* and *BMW*. Contrary to Bosack and Lerner's argument, the panel did not disregard or ignore these cases. Whether the panel misinterpreted or misapplied them is beyond the scope of our review. *See, e.g., Kyocera*, 341 F.3d 1003.

The proper focus of our review for manifest disregard of the law is the panel's conduct, not the panel's interpretation of the law. *See, e.g., Hall*, 128 S. Ct. at 1404 (explaining that § 10 focuses on "extreme arbitral conduct" such as corruption, fraud, evident partiality, misconduct, misbehavior, and exceeding powers); *Kyocera*, 341 F.3d at 1003 ("[L]egal and factual errors lie far outside the *category of conduct* embraced by § 10(a)(4).") (emphasis added).

The Eighth Circuit has clearly illustrated this distinction between conduct and interpretation: "Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' " *Lincoln Nat'l Life Ins. Co.*, 374 F.3d at 675. Bosack and Lerner have failed to point to any conduct on the part of the panel, such as the intentional rejection of controlling precedent, that would amount to manifest disregard of the law.

D

Finally, Bosack and Lerner argue that the panel violated California law by awarding punitive damages against them for their conduct during the arbitration proceedings.

[13] Absent an abuse of process or malicious prosecution, "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates*

Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates, 114 Cal. Rptr. 2d 708, 730 (Cal. Ct. App. 2001).

[14] Given the language of Award 5, we cannot say that the arbitrators based the decision regarding punitive damages on the parties' conduct in court or during the arbitration proceedings. In Award 5, the panel explicitly stated that it was basing its awards of punitive damages on Bosack and Lerner's actions, which, "repeated over time," constituted a "planned, malicious, [and] purposeful attempt" to convert Soward's interest in Cartesian. The panel punished Bosack and Lerner for their conduct by which they accomplished their conversion, not for their conduct during arbitration.

III

Finally, Bosack and Lerner argue that Awards 4 and 5 should be vacated because they are irrational.

A

[15] An award may be vacated if it is "completely irrational." *Comedy Club II*, 553 F.3d at 1288. This "standard is extremely narrow and is satisfied only 'where [the arbitration decision] fails to draw its essence from the agreement.' " *Id.* (citing *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001)) (alterations in *Comedy Club II*).

An award "draws its essence from the agreement if the award is derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions."

McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005); *see also Coast Trading Co., Inc., v. Pac. Molasses Co.*, 681 F.2d 1195, 1197 (9th Cir. 1982) (holding that an "arbitrator is confined to the interpretation and application of the parties' agreement" and that an "award is legitimate only so long as it draws its essence from the . . . agreement") (quoting *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) (internal quotation marks omitted)). Under this standard of review, we do not "decide the rightness or wrongness of the arbitrators' contract interpretation, only whether the panel's decision 'draws its essence' from the contract." *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1024 (9th Cir. 1991) (quoting *New Meiji Market v. United Food & Comm'l Workers Local Union 905*, 789 F.2d 1334, 1335 (9th Cir. 1986)). We will not vacate an award simply because we might have interpreted the contract differently. *Id.*

B

[16] Bosack and Lerner contend that Awards 4 and 5 are completely irrational because they are "irreconcilable" with Awards 1 and 3, and Award 4 is "internally incoherent." Even assuming Lerner and Bosack are correct that the awards are based on contradictory findings of fact, this argument is beyond our scope of review. Under the "completely irrational" doctrine, the question is whether the award is "irrational" with respect to the contract, not whether the panel's findings of fact are correct or internally consistent. *See, e.g., Comedy Club II*, 553 F.3d at 1288; *Hoffman*, 236 F.3d at 462.

[17] Bosack and Lerner have failed to cite a single case in which we or any other court of appeal vacated an award because the factual findings were contradictory. We have repeatedly held that an award may not be vacated even where there is a clearly erroneous finding of fact. *See, e.g., Kyocera*, 341 F.3d at 1003 ("The risk that arbitrators may . . . make errors with respect to the evidence on which they base their rulings[ ] is a risk that every party to arbitration assumes, and such . . . *factual errors lie far outside the category of conduct embraced by § 10(a)(4).*") (emphasis added). Thus, even if the panel erred by making contradictory findings of fact, this does not render the decision completely irrational.

C

Bosack and Lerner also contend that Award 4 is completely irrational because the Panel ignored controlling terms of the Wood Agreement. Specifically, Bosack and Lerner argue that Award 4 was issued in violation of §§ 2.3 and 8.4 of the Wood Agreement, which govern the winding up of the partnership. In contrast to the argument raised above, this argument comes squarely within the scope of the completely irrational doctrine. *See, e.g., Comedy Club II*, 553 F.3d at 1288; *Hoffman*, 236 F. 3d at 462.

Section 8.4 of the Wood Agreement provides that any change in the General Partner's status (other than a transfer of his partnership interest) will convert the General Partner's interest into a limited partnership interest. Pursuant to this section, the panel held in Award 1 that Soward's status reverted

from general partner to limited partner when Bosack removed him in November 2003.

In Award 4, the panel found that Bosack's actions effected a dissolution of the partnership under Delaware law. Bosack and Lerner contend that this finding conflicts with § 2.3 of the Wood Agreement, which provides that no general or limited partner has the right to terminate or dissolve the partnership.

Bosack and Lerner also contend that the panel disregarded the terms of the Wood Agreement by finding that Soward was entitled to an accounting. Section 2.3 of the Wood Agreement states that no partner is entitled to demand or receive the return of his capital contribution.

[18] Had the panel found that Soward was entitled to an accounting and a distribution under the terms of the Wood Agreement, or that the Agreement mandated the dissolution of the partnership, Bosack and Lerner might be correct. But the panel did not find that Soward was entitled to the relief accorded him in Awards 4 and 5 under the terms of the Wood Agreement. Instead, the panel found that Soward was entitled to an accounting and distribution *under Delaware law*. Similarly, the panel found that under Delaware law Bosack's actions terminated the partnership. The Wood Agreement itself provides that Delaware law controls. Accordingly, the panel's findings and conclusions in Award 4 are not inconsistent with the terms of the Wood Agreement, and are not "completely irrational."

IV

[19] Bosack and Lerner offer no argument challenging the award of attorney fees and costs, outside of their joint contention that the award should be reversed on the merits. Because we affirm the district court's confirmation of the arbitration awards, we also affirm the award of attorney fees and costs.

CONCLUSION

In sum, Bosack and Lerner have failed to demonstrate that the panel exceeded its authority. "The risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4)." *Kyocera*, 341 F.3d at 1003. Lerner and Bosack accepted this risk when they consented to arbitration; they cannot now claim the benefits of expanded judicial review simply because the awards were unfavorable to them.

The judgment of the district court is **AFFIRMED.**

APPENDIX C

JUDGMENT & ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN THE MATTER OF THE ARBITRATION BETWEEN, LEONARD BOSACK, et al., Petitioners, v. DAVID C. SOWARD and & MANAGEMENT COMPANY, Respondents.	No. C07-574Z **JUDGMENT**

The Final Award dated July 27, 2007, issued by arbitrators J. Lani Bader and Zela G. Claiborne in the matter David C. Soward et al. v. The & Trust et al., No. 74 181 Y 00129 04 DEAR (as amended by Hearing Order No. 52), before the Commercial Arbitration Tribunal of the American Arbitration Association, having been confirmed by Order of this Court on February 25, 2008, and the Final Award having been satisfied only in part, IT IS ADJUDGED that Respondent David C. Soward is awarded JUDGMENT in his favor as follows:

1. Respondent David C. Soward shall recover from Petitioner Leonard Bosack the following amounts:

(a) the principal sum of $10,999,494.00 per section 3.xxviii of the Final Award;

(b) post-award, pre-judgment interest at the California statutory rate of ten percent per annum ($3,013.56 per diem) for each day from July 27, 2007, through the date of entry of this Judgment, for a total pre judgment interest of $705,173.04; and

(c) the additional amounts listed in item 3 below.

2. Respondent David C. Soward shall recover from Petitioner Sandy Lerner the following amounts:

(a) the principal sum of $8,555,162.00 per section 3.xxix of the Final Award;

(b) post-award, pre-judgment interest at the California statutory rate of ten percent per annum ($2,343.88 per diem) for each day from July 27, 2007, through the date of entry of this Judgment, for a total pre judgment interest of $548,467.92; and

(c) the additional amounts listed in item 3 below.

3. Respondent David C. Soward shall recover from Petitioners Leonard Bosack, Sandy Lerner, Cartesian Partners, L.P., & Capital Partners, L.P., The & Trust, Richard Troiano, the Leonard Bosack and Bette M. Kruger Foundation, and & Capital, Inc., jointly and severally, the following amounts:

(a) the principal sum of $4,105,904.39 per sections 3.xxx through 3.xxxii of the Final Award; and

(b) post-award, pre judgment interest at the California statutory rate of ten percent per annum ($1,124.91 per diem) for each day from July 27, 2007, through the date of entry of this Judgment, for a total pre-judgment interest of $263,226.60.

4. All amounts awarded by this Judgment shall accrue post-judgment interest at 1.52 percent, as provided in 28 U.S.C. § 1961, from the date of the entry of this Judgment.

5. Respondents David C. Soward and & Management Company are awarded taxable costs against Petitioners.

Filed and entered this 17th day of March, 2008.

BRUCE RIFKIN, Clerk

/s/ Claudia Hawney
Claudia Hawney
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN THE MATTER OF THE ARBITRATION BETWEEN, LEONARD BOSACK, et al., Petitioners, v. DAVID C. SOWARD and & MANAGEMENT COMPANY, Respondents.	No. C07-574Z **ORDER**

In a Minute Order entered March 4, 2008, docket no. 71, the Court construed the "Comments of David C. Soward on Proposed Form of Judgment Confirming Arbitration Award," docket n. 70, as a motion for reconsideration of the Court's Order, docket no. 68, at 18, denying post-award pre judgment interest. The Court requested briefing pursuant to Local Rule CR 7(h)(3). Having considered the briefs in support of, and in opposition to, the motion for reconsideration at docket nos. 70, 72, and 73, the Court now enters the following Order granting Soward's motion for reconsideration, docket no. 70.

Respondent David C. Soward[1] seeks post-award, pre judgment interest pursuant to California Civil Code section 3287, subsection (a), which provides, in pertinent part: "Every person who is entitled to recover damages certain, . . . and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day [with certain exceptions not relevant here]." "[A] successful party to an arbitration is entitled to 'recover damages certain' under California Civil Code section 3287, subdivision (a) on the date the arbitrator renders his award." Pierotti v. Torian, 81 Cal.App.4th 17, 27 (2000) (citing Britz, Inc. v. Alfa-Laval Food & Dairy Co., 34 Cal.App.4th 1085, 1106 (1995) (quoting Cal. Civ. Code § 3287(a)). "The arbitration award itself results in a new and fixed liability." Id. (quoting Britz, 34 Cal. App.4th at 1107). The arbitration award did not become final until July 27, 2007. Post-award, pre judgment interest is "mandatory" under California law. Pierotti, 81 Cal.App. 4th at 28.

Although Soward failed to move for post-award, pre-judgment interest in his motion to confirm the arbitration award, docket no. 52, Petitioners have now had an adequate opportunity to respond on the merits of the issue, and the Court will not deny such interest on procedural grounds.[2] It is undisputed that Soward's Petition to Confirm Contractual Arbitration Award requested post-award, pre

---

[1] Respondent & Management Company has not moved for post-award, pre-judgment interest.

[2] The Court similarly rejects Petitioners' procedural argument that Soward did not properly label his motion for reconsideration as such.

judgment interest at the California statutory rate of ten percent per annum from the July 27, 2007 date of entry of the Final Award. Docket no. 70, Ex. A (Petition) at 3, ¶ 10(d).

Although the arbitrators were careful to indicate in the Final Award whether and to what extent they were granting pre-judgment interest on the various awards, it appears that they only considered and awarded pre-award, pre-judgment interest. There is no evidence in the record that the arbitrators considered and rejected post-award, pre-judgment interest.

Petitioners argue that pre judgment interest cannot be awarded on punitive damages. See Lakin v. Watkins Associated Indus., 6 Cal. 4th 644, 663-644 (1993). Lakin, however, held that California Civil Code "section 3291 does not authorize the award of prejudgment interest on punitive damages" because it "limit[s] prejudgment interest to 'damages for personal injury.'" Lakin, 6 Ca1.4th at 664 (quoting Cal. Civ. Code § 3291). In the present case, Soward is relying upon California Civil Code section 3287, subsection (a), not section 3291. Although the California Supreme Court in Lakin discusses one purpose of section 3287, and of prejudgment interest in general, as being "to provide just compensation to the injured party for loss of use of the award during the prejudgment period," that statement does not preclude an award of post-award, pre judgment interest under section 3287, subdivision (a) on an arbitration award including a punitive damages component. Indeed, California courts after Lakin have awarded post-award, pre judgment interest

under section 3287, subsection (a) on an arbitration award including a punitive damages component. See, e.g., Pierotti, 81 Cal.App.4th at 27-28. Lakin is further distinguished from the present case because it is not an arbitration case, whereas Pierotti is a case involving the confirmation of an arbitration award.

Petitioners have not opposed the application of California law to determine the rate of post-award, pre-judgment interest. Petitioners have also not opposed the specific per diem amounts of post-award, pre judgment interest requested by Soward.

The Court GRANTS Soward's motion for reconsideration, docket no. 70. Accordingly, the Court AWARDS Soward post-award, pre judgment interest at the rate of $3,013.56 per diem as to Bosack, $2,343.88 per diem as to Lerner, and $1,124.90 per diem as to all Petitioners, for each day from July 27, 2007, through the date of entry of the Judgment.

The Clerk is directed to enter a Judgment in this matter in accordance with the Court's Order, docket no. 68, as amended by this Order awarding post-award, pre judgment interest.

IT IS SO ORDERED.

DATED this 17th day of March, 2008.

/s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

APPENDIX D

DISTRICT COURT ARBITRATION ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN THE MATTER OF THE ARBITRATION BETWEEN LEONARD BOSACK, SANDY LERNER, and CARTESIAN PARTNERS, L.P., Petitioners, v. DAVID C. SOWARD and MANAGEMENT COMPANY, Respondents.	No. C07-574Z
DAVID C. SOWARD, et al., Petitioners, v. THE & TRUST, et al., Respondents.	No. C07-1663Z ORDER

This matter comes before the Court on Petitioner Sandy Lerner's Motion to Vacate Certain Arbitral Awards Pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, docket no. 33, Petitioners Leonard Bosack, The Leonard Bosack Trust, Richard Troiano,

The & Trust, & Capital Partners, L.P., Cartesian Partners, L.P., The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc., and & Capital, Inc.'s Motion to Vacate Arbitration Awards, docket no. 40, and David C. Soward's Cross-Motion to Confirm Final Arbitration Award, docket no. 52. The Court has now considered the briefs, declarations, and exhibits, in support of, and in opposition to, the motions, counsel's oral argument on January 31, 2008, and Petitioner Sandy Lerner's Notice of Submission of Additional Authority, docket no. 65. The Court enters the following Order confirming the arbitration awards.

I. BACKGROUND

In the 1990s, Petitioners Sandy Lerner and Leonard Bosack, the founders of Cisco Systems, Inc., hired Respondents David Soward and a company Soward created, & Management Company (collectively "Soward"), to manage their personal assets. Bromberg Decl., docket no. 42, Ex. 30 (Bosack Decl.) ¶¶ 3-4. Soward managed the assets of four "investment entities:" (1) the & Trust, a charitable remainder trust organized under California law in which Soward was the manager, and Lerner, Bosack and Richard Troiano were the trustees; (2) the Leonard X. Bosack and Bette M. Kruger Charitable Foundation (the "Foundation"); (3) & Capital Partners, L.P. ("& Capital"), a Delaware limited partnership in which Soward was the general partner and the Bosack Trust and the Lerner Trust were the limited partners; and (4) Cartesian Partners, L.P. ("Cartesian"), a Delaware limited partnership in which Soward was the general

partner and the Bosack Trust was the sole limited partner. Id., Ex. 30 (Bosack Decl.) ¶¶ 6-7. Lerner was not a partner in Cartesian at the time of its formation in 1999. Id., Ex. 30 (Bosack Decl.) ¶ 6.

On November 24, 2003, Lerner and Bosack, through their lawyers, sent Soward's lawyer a letter[1] that "discontinued Mr. Soward's engagement as their investment manager effective immediately, removed him as the general partner for the limited partnerships, and concluded his employment with & Capital, Inc." Bromberg Decl., Ex. 13 (Letter). A draft complaint accompanied the letter. Id., Ex. 13 (Draft Complaint). At or around the same time as Bosack's November 2003 removal of Soward as general partner of Cartesian, Bosack substituted SLLB, LLC ("SLLB"), a Delaware limited liability company whose members were the Sandy Lerner Trust and the Leonard Bosack Trust, as general partner of Cartesian. Appendix of Arbitration Awards, docket no. 44, Ex. 4 (Interim Award #4) at 4. SLLB took control of the assets of Cartesian. Interim Award #4 at 20.

In February 2004, Soward demanded arbitration. Bromberg Decl. ¶ 3, Ex. 1 (Statement of Claim).[2]

---

[1] The letter was drafted on behalf of "Sandy Lerner and Leonard Bosack, and their respective individual trusts, The & Trust, & Capital Partners, and Cartesian Partners, L.P."

[2] Soward alleged claims against the four investment entities (i.e., The & Trust, the Foundation, & Capital, and Cartesian), Sandy Lerner, individually and as Trustee on behalf of The & Trust and the Sandy Lerner Trust, Leonard Bosack, individually and as Trustee on behalf of The & Trust and the Leonard Bosack Trust, and Richard Troiano, as Trustee on

Among other claims, Soward sought a dissolution of Cartesian and an accounting of his interest in the Cartesian partnership. Id., Ex. 1 at 19-21, ¶¶ 82- 88. The & Trust Management Agreement contained an arbitration clause. Bromberg Decl., Ex. 8 (the "Management Agreement") at 4, ¶ 9. The arbitration clause provided that "any dispute between the parties concerning any provision in this Agreement . . . shall be resolved by arbitration," and that "[t]he arbitrators shall have the authority to make an award based on the equities of the dispute, and such award may include attorneys' fees and costs to . . . the party primarily prevailing in such dispute." Id., Ex. 8 at 4, ¶ 9. The agreements governing the other investment entities, including Cartesian, did not contain arbitration clauses. Id., Ex. 9 (& Capital Agreement), Ex. 10 (the unexecuted "Wood" Agreement governing Cartesian); see also id., Ex. 30 (Bosack Decl.) ¶ 6.

In July 2004, Bosack and Lerner filed a lawsuit against Soward in this Court (the "2004 action"). Bromberg Decl. ¶ 34. In the 2004 action, Bosack and Lerner took the position that Soward "ha[d] no lawful interest" in Cartesian. Bosack v. Soward, Case No. C04-1664-TSZ, docket no. 1 (Complaint) at 15, ¶ 56; see also Interim Award #4 at 7. Soward moved this Court to stay the 2004 action pending arbitration. Because the 2004 action concerned all four investment entities, a central issue was whether the arbitration clause in The & Trust Management Agreement applied to disputes concerning the

---

behalf of The & Trust. Soward did not allege any claims against SLLB.

Foundation, & Capital, and Cartesian. See generally Bromberg Decl., Ex. 27 (Transcript of Hearing). In November 2004, this Court ordered the parties[3] to proceed to arbitration to permit the arbitrators to determine the arbitrability of the disputes between the parties. Id., Ex. 27 at 41-42. Lerner and Bosack subsequently agreed to arbitrate all disputes between the parties. Id., Ex. 2 at 8:23-25, ¶ 30 ("This panel need not address issues of arbitrability, however, as [Bosack and Lerner and the other Petitioners] have elected to assert their claims in the present arbitration by filing this Amended Answering Statement and Counterclaims."). As a result, the panel proceeded to determine all claims between the parties in accordance with the arbitration clause contained in The & Trust's Management Agreement.

Between September 7, 2006 and June 5, 2007, a panel of arbitrators (the "panel")[4] issued five interim awards, which were subsequently brought within a single final award on July 26, 2007. Appendix of

---

[3] By the time the Court ordered the parties to proceed to arbitration, Plaintiffs had amended their complaint to add three additional plaintiffs: (1) & Capital Partners, L.P., (2) Cartesian Partners, L.P., and (3) & Capital, Inc. Bosack v. Soward, Case No. C04-1664-TSZ, docket no. 24 (Amended Complaint).

[4] Three arbitrators, Professor J. Lani Bader, Zela G. Claiborne, and Thomas J. Klitgaard, issued Interim Award Nos. 1-4. Because a conflict of interest arose for Mr. Klitgaard during the course of arbitration, he did not participate in subsequent awards. As a result, Professor Bader and Ms. Claiborne, whose resumes are attached as Exhibits 15 and 16 to the Sharp Decl., docket no. 53, issued Interim Award No. 5, the Final Award, and Hearing Order No. 52.

Arbitration Awards, docket no. 44, Exs. 1-5 (the "Interim Award #s 1-5") and Ex. 6 (the "Final Award"). On August 14, 2007, the panel issued Hearing Order No. 52 to correct in part the Final Award. Id., Ex. 7. The arbitration involved in excess of sixty hearing days over a period of more than two years. Final Award at 2. Four experts and approximately twenty-six witnesses testified. Id. Over five hundred exhibits were introduced into evidence. Id. at 3; see also Sharp Decl., docket no. 53, ¶ 2 (counting 706 exhibits).

Interim Award #1, which the panel issued on September 7, 2006, determined numerous claims and counterclaims,[5] including Soward's claim for an accounting and distribution of his partnership interest in Cartesian. Interim Award #1 at 13-20, 56-57. The panel found that "[t]he Cartesian Partnership Agreement is an oral agreement," and that "the Wood Agreement ought to provide the relevant terms." Id. at 15-16; Interim Award #3 at 5 (noting that "the Wood agreement . . . [is] the applicable partnership agreement."); see Bromberg Decl., Ex. 10 ("Wood Agreement"). Although the parties never signed the Wood Agreement, the panel found that "Soward and Bosack commenced to implement its terms" after Soward sent it to Bosack. Interim Award #1 at 15. The panel found that "Bosack had no right to remove [Soward] as General

---

[5] This Order focuses on the panel's decision in Interim Award #1 on Soward's claim #2, regarding Soward's share in the Cartesian partnership; however, it is noteworthy that Petitioners prevailed on some of their counterclaims against Soward. See Interim Award #1 at 31-34, 39-43, 51-55; Final Award at 8-9, Items x, xv, xviii, xix.

Partner" under the Wood Agreement, and that "upon Bosack attempting to do so. . . Soward's status would . . . revert to that of a 'special' limited partner" pursuant to Section 8.4[6] of the Wood Agreement. Interim Award #1 at 16; see also id. at 56 ("Soward is and continues to be a partner in Cartesian and is entitled to be paid the value of his capital account as of his withdrawal as partner"); Interim Award #3 at 3. The panel ordered that "an accounting be made of the value of Soward's interest as of 9/30/2006." Interim Award #1 at 19, 56. The panel then ruled that if Cartesian paid Soward the value of his interest within sixty days of the accounting, then Soward would be deemed to have withdrawn as partner. Id. at 19-20, 56-57; see also Interim Award #3 at 11. Alternatively, if Cartesian failed to timely pay Soward, then the panel decreed that Cartesian would be dissolved pursuant to Title 6, Section 17-802 of the Delaware code applicable to limited partnerships. Interim Award #1 at 19-20, 56-57. Although the panel stated that Interim Award #1 was "final," see Interim Award #2 at 8, the panel also

---

[6] "Conversion of General Partner's Interest. Upon cessation of any General Partner's status as a general partner for any reason other than as a result of a transfer of such General Partner's interest pursuant to Section 8.2, such General Partner's interest will be converted into a limited partner interest. In the event of such a conversion, such General Partner's interest in the net profits and losses of the Partnership will remain unchanged, but such General Partner will lose those rights and obligations accorded a general partner under this Agreement and will assume the rights and obligations of a limited partner." Bromberg Decl., Ex. 10 ("Wood Agreement") § 8.4. Neither Petitioners nor Respondents argued that Section 8.2, referenced in Section 8.4, applies to the facts of this case.

stated that Interim Award #1 was "not intended to be confirmable" until it was "incorporated into and made part of the final award." Interim Award #1 at 9.

In Interim Award #3, which the panel issued on December 12, 2006, the panel determined the value of Soward's interest in Cartesian as of September 30, 2006 to be $1,464,391, which comprised Soward's capital contribution ($525,636), together with 14.5% interest in the profits ($970,755), less Soward's proportionate share of the capital call ($32,000). Interim Award #3 at 9-10. On December 14, 2006, which was two days after the panel completed the accounting and valuation of Soward's interest in Interim Award #3, Bosack or SLLB, it is not clear which, paid Soward $1,464,391, plus interest. Interim Award #4 at 7-8. In contrast to Interim Award #1, the panel intended Interim Award #3 "to be confirmable upon entry by the Panel." Id. at 10. In the Final Award, the panel acknowledged that Interim Award #3 had been paid and satisfied and that "Soward for every purpose is deemed to have withdrawn as a partner in Cartesian." Final Award at 10.

During the proceedings leading to Interim Award #1, Soward asked to amend his claims to add tort claims with respect to his partnership interests in & Capital and Cartesian. Nonaka Decl., docket no. 35, Ex. 11. The panel granted in part the motion, "adding a claim for breach of fiduciary duty as to Bosack for failing to provide an accounting and converting Soward's interest in Cartesian (Seventh Claim) and a separate claim for conversion against

Bosack and Lerner for converting Soward's interest in Cartesian to their own use (Eighth Claim)" and "claims for punitive damages relating to the Seventh and Eighth claims." Interim Award #4 at 8.[7] After hearings in September 2006 and November 2006, the panel issued Interim Award #4 on January 25, 2007 regarding Soward's tort claims for breach of fiduciary duty and conversion. The panel determined that Bosack was liable for tortuous breach of fiduciary duty and that Bosack and Lerner were liable for conversion of Soward's interest in Cartesian.

The panel found Bosack liable for breach of fiduciary duty as a result of Bosack's "failing both to account to Soward for the value of his interest in Cartesian within a reasonable time and to pay him the value of that interest." Interim Award #4 at 20. The panel determined that the duty to distribute Soward's partnership interest arose under Delaware limited partnership law, 6 Del. Code § 17-604, as a result of Bosack's removal of Soward as general partner. Id. at 13-14. Bosack had removed Soward as general partner without any authority under the Wood Agreement. Bosack intentionally "breached his fiduciary duty as sole limited partner and as an owner of SLLB" by "exercising dominion and control over the assets of Cartesian, in derogation of Soward's rights." Id. at 22. Soward's interest "was due and payable to [Soward] as of September 29, 2004." Id. at 18. Between September 2004 and December 2006, when Soward was ultimately paid

---

[7] The panel permitted Soward's tort claims as to Cartesian, but did not allow Soward to add tort claims with respect to his partnership interest in & Capital.

his interest pursuant to Interim Award #3, Soward "was deprived of the use of those funds for the support of himself and his family, or for whatever other purposes he might choose to put them." Id. Bosack "knew the value of Soward's interest in Cartesian as of September 29, 2004, the date that SLLB[8] signed its [tax] return" for 2003. Id. at 16. The panel found that "the failure of Bosack to provide an accounting to Soward was done for the purpose of making it as difficult as possible for Soward to receive his funds in Cartesian and to hurt him." Id.

The panel also found that Bosack's breach of fiduciary duty was "exacerbated by Bosack's role in manipulating the tax returns filed for the succeeding fiscal year, reducing the amount [of] Soward's interest in Cartesian as of December 31, 2003, from $1,001,101 to $135,889 as a maximum." Id. at 16. "Bosack caused the reduction to be made in the [2004] tax return, even though . . . the underlying books and records of Cartesian were never changed and continued to show Soward's interest at $1,001,101." Id. "A balance of $866,101 was transferred [from Soward's account] to Bosack's account" on the 2004 tax return; "[n]o funds were transferred to SLLB's capital account." Id. at 11. "Bosack was kept personally apprised of the transfer of the $866,101" and Bosack "signed the [2004] tax return, under oath, on behalf of SLLB." Id. at 12. The panel found that "the amount of damage was the

---

[8] The panel stated that "[t]he evidence does not show whether Bosack or Lerner signed [the 2003 tax return] for SLLB," but they inferred that Bosack signed the form. Interim Award #4 at 9.

value of Soward's interest in the assets as of December 31, 2003 – $1,001,101 – plus interest from September 29, 2004 . . . to December 14, 2006." Id. at 22.[9]

With respect to the conversion claim against Bosack and Lerner, the panel applied California law to define a conversion as "the wrongful exercise of dominion over the personal property of another, after a demand, accompanied by damage." Interim Award #4 at 24. The panel found that "[w]hen Bosack, through the Bosack Trust and through SLLB, and when Lerner through SLLB, took over as of November 24, [2003], they appropriated [Soward's share of the assets of Cartesian] to their own use." Id. "Bosack and Lerner, through SLLB, began to use the assets for paying the operating expenses of their new partnership." Id. SLLB also "file[d] a false partnership tax return" in 2004, which "did not itself constitute a conversion of Soward's interests in the assets," but which "showed a knowing and callous indifference to [Soward's] rights in the property." Id. The 2004 K-1, showing Soward's interest reduced to $135,889, was never sent to Soward. Id. at 12. The panel recognized that although "[t]he evidence did not show whether Lerner personally knew of these events [involving the tax returns] when they occurred . . . when they surfaced in the arbitration, she did not disavow them." Id. The panel concluded that "Bosack and Lerner through SLLB did not just

[9] Because the $1,001,101 in damages, plus interest, were less than the $1,464,391 paid to Soward on December 14, 2006, as a result of the accounting award in Interim Award #3, the breach of fiduciary duty claim was deemed satisfied as of December 14, 2006. Interim Award #4 at 22; Final Award at 10-11.

interfere with the dominion of Soward over a small part of his partnership interest in a small amount of specific property, but all of it." Id. at 25. "[T]heir actions, separately for Bosack and through SLLB for Bosack and Lerner, in failing to turn over to Soward his interest in the assets of Cartesian within a reasonable time was willful conversion" and that Bosack and Lerner are "each individually responsible for the actions of SLLB." Id. "[A] reasonable time to turn over the assets was no later than September 24, 2004. . . . This was the effective final date of the conversion." Id. The panel awarded Soward $1,001,101 for conversion, plus interest at 10%; in the Final Award, the panel deemed this conversion claim satisfied in light of the accounting award. Final Award at 11-12.

Interim Award #5, which the panel issued on June 5, 2007, and Hearing Order No. 49, awarded Soward punitive damages for Bosack and Lerner's tortious conduct. The panel applied the following California law on punitive damages: "Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages 'for sake of example and by way of punishing the defendant.'" Interim Award #5 at 4 (quoting Simon v. San Paolo, 35 Cal. 4th 1159 (2005)); see Cal. Civ. Code § 3294(a). In awarding punitive damages, the panel largely relied on its findings outlined in Interim Award #4 with respect to Bosack and Lerner's tortious conduct and "bad actions," but also included "a specific finding that Lerner and Bosack acted with the intention of hurting Soward." Id.; see also id. at 6 ("The attempt to strip Soward of his

interest in Cartesian was not a casual enterprise, but rather a planned, malicious, purposeful attempt to take Soward's interest in Cartesian away from him and convert it for Bosack's use."). The panel concluded that "it has been established with clear and convincing evidence that both Bosack and Lerner have acted with malice and oppression toward Soward." Id. at 2 (quoting Hearing Order No. 49); see also Interim Award #4 at 16, 21, 24; Interim Award #5 at 4, 6.

The panel addressed the culpability of Lerner, separate from Bosack:

> Although the Panel has found that Bosack was the architect of the scheme to strip Soward of his capital account in Cartesian, Lerner, as detailed in Award #4, was a willing participant in the creation of SLLB. She acted in concert with Bosack in implementing the scheme to strip Soward's capital account from Soward and to transfer the account to Bosack. Both of them attempted to eliminate Soward as a partner at all.

Interim Award #5 at 2-3 (quoting Hearing Order No. 49). The panel, citing California case law, recognized that due to "the lack of state action, a private contractual arbitration is not subject to the strictures of the due process clause." Id. at 3. Notwithstanding, the panel "endeavored to follow the due process guidelines set forth in BMW v. Gore and successor cases." Id.; see also id. at 4-6. The panel considered the net worth of Bosack and Lerner in determining the amount of punitive damages that

would have "sufficient sting" and "a sufficiently deterrent impact." Id. at 3, 6. The panel assessed $10,999,494 in punitive damages – or nine times the compensatory award of $1,222,166 – against Bosack, and $8,555,162 in punitive damages – or seven times the compensatory award – against Lerner. Id. at 6-7; Final Award at 12. The panel issued the Final Award on July 26, 2007. In the Final Award, the panel decided that Soward was the prevailing party in the arbitration and awarded Soward $3,360,576.80 in attorneys' fees and costs. Final Award at 5. The panel allocated $3,004,741.37 for attorneys' fees and costs incurred through Interim Award #3, and $355,835.43 incurred thereafter. Id. at 6, 12. The panel also incorporated Interim Awards #1-5 into the Final Award. Id. at 6-12.

Petitioners move this Court to vacate Interim Awards #4 and #5 as to both Bosack and Lerner, Hearing Order No. 49, and the Final Award as to Soward's tort claims, punitive damages, and attorneys' fees.[10]

II. DISCUSSION

A. Judicial Review of Arbitration Awards

"The inherent nature of arbitration is a consensual agreement of the parties to substitute a final and binding judgment of an impartial entity for the judgment of the court." Coast Trading Co. v. Pac. Molasses Co., 681 F.2d 1195, 1197 (9th Cir. 1982).

---

[10] Petitioners are not moving to vacate Interim Awards #1, #2 or #3.

"The arbitration award is binding and enforceable unless the district court finds grounds to vacate it" in the Federal Arbitration Act, 9 U.S.C. § 10. Id.; see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 994 (9th Cir. 2003) (en banc) ("The Federal Arbitration Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award"); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1458 (11th Cir. 1997) ("The FAA presumes that arbitration awards will be confirmed, 9 U.S.C. § 9, and enumerates only four narrow bases for vacatur"). "Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute." Kyocera, 341 F.3d at 994; see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) ("Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

Petitioners move to vacate the awards pursuant to 9 U.S.C. § 10(a)(4), which authorizes a court to vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." "Arbitrators 'exceed their powers' in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational or exhibits a manifest disregard of the law." Kyocera, 341 F.3d at 997 (internal citations and quotations omitted). These grounds afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit

unnecessary public intrusion into private arbitration disputes." Id. at 998. "'The court is forbidden to substitute its own interpretation [of a contract] even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong.'" Id. at 999 (quoting Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504-05 (7th Cir. 1991)); see also Wilko v. Swan, 346 U.S. 427, 436-437 (1953) ("the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation"). Manifest disregard of the law means that "the arbitrators recognized the applicable law and then ignored it." Luong v. Circuit City Stores, Inc., 368 F.3d 1109, 1112 (9th Cir. 2004). In addition, "an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law." Coutee v. Barington Capital Group, L.P., 336 F.3d 1128,1133 (9th Cir. 2003).

The panel's authority comes from "the consent of the parties." Coast Trading, 681 F.2d at 1198.[11] Here, the arbitration clause in The & Trust's Management Agreement granted the panel "the authority to make an award based on the equities of the dispute." Bromberg Decl., Ex. 8 at 4, ¶ 9. The arbitration

---

[11] In Coast Trading, the court vacated an arbitration award "as being contrary to remedies provided in the contract and as beyond the authority of the arbitrators under the submission." Coast Trading, 681 F.2d at 1198. The Ninth Circuit noted that an arbitration award "will not be shielded from judicial scrutiny intended to insure that the award is grounded on the agreement of the parties and the issues they present for resolution." Id.

clause further authorized an award of "attorneys' fees and costs to the party whom the arbitrator(s) determines to be equitably entitled to such attorneys' fees as the party primarily prevailing in such dispute." Id., Ex. 8 at 4, ¶ 9. The panel's authority also derived from the other agreements governing the investment entities, and from the consent of all parties to have their disputes resolved in the arbitration proceedings. See Bromberg Decl., Ex. 2 at 8:23-25, ¶ 30.

B. Tort Awards

1. Wood Agreement

Petitioners[12] argue that the panel exceeded its powers in Interim Award #4 by ignoring the plain terms of Wood Agreement, which the panel, in Interim Awards #1 and #3, found "ought to provide the relevant terms" of the oral agreement governing the Cartesian Partnership. Specifically, Petitioners argue that under Section 8.4 of the Wood Agreement, Soward's removal as general partner converted his interest in the Cartesian Partnership into a limited partner interest, and a limited partner has no right to a distribution until he withdraws or until the partnership dissolves. Thus, Petitioners argue that they did not breach any fiduciary duty or convert any property by failing to distribute that interest between 2004 and 2006.

---

[12] These first three arguments – concerning the Wood Agreement, AAA Rule 46, and the functus officio doctrine, were presented in Bosack's motion to vacate, in which Lerner joined. See Bosack's Mot., docket no. 40, at 10-17; Lerner's Mot., docket no. 33, at 1 n.1.

Soward argues that Petitioners failed to treat Soward as a limited partner and, as a result, the panel could appropriately determine that Bosack breached his fiduciary duty and that Bosack and Lerner converted his partnership interest. Soward also points out that although the panel chose to look to the Wood Agreement to provide the basis for Soward's rights with respect to Cartesian in Interim Award #1, the panel did not find that the Wood Agreement imposed any limitations on Soward's remedies for tortious acts.

In his reply brief, Bosack explained that he is "not arguing that the Panel's accounting and tort awards are inherently contradictory," but rather is "arguing that the specific ground on which the tort awards were based, the supposed duty to distribute Soward's interest arising out of the dissolution of the partnership, conflicts with the specific findings made in the accounting claim." Bosack's Reply, docket no. 58, at 5:22-26. This Court is not authorized to review these awards *de novo*. Rather, the Court is limited by 9 U.S.C. § 10(a)(4) and cannot conclude that the arbitrators "exceeded their powers" in granting Soward's tort claims. Interim Award #4 was not "completely irrational" with the accounting award in Interim Awards #1 and #3, and Bosack's counsel at oral argument emphasized that Petitioners were not arguing that the panel manifestly disregarded the law. To the extent there are inconsistencies between the legal conclusions and/or factual findings in Interim Awards #1 and #4, the Court declines to vacate the tort awards on this basis because of the standard of review, which prohibits vacatur based on

erroneous reasoning, and because the ultimate awards are not "inherently contradictory," as admitted by Petitioners in Bosack's reply brief. It is consistent for the panel to award an accounting and distribution of Soward's partnership interest in Cartesian, and damages for Petitioners' conversion of that same partnership interest. The panel was authorized "to make an award based on the equities of the dispute," and the panel was entitled to award Soward his interest in assets of Cartesian as of December 31, 2003, with interest as of September 29, 2004, as the damages for the tort claims in light of Petitioners' failure to recognize Soward's post-removal status as limited partner pursuant to the Wood Agreement.

2. AAA Rule 46

Petitioners argue that the panel exceeded its powers in Interim Award #4 by reconsidering its prior determinations in violation of Commercial Arbitration Rule 46 of the American Arbitration Association ("AAA"). Rule 46 provides that "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided." Bromberg Decl., Ex. 31 (AAA Rules) at 496. The panel, in granting Soward's tort claims, did not redetermine the merits of the accounting claim already decided. Interim Award #4 left Interim Award #3 unchanged, and, indeed, Interim Award #3 was already paid and satisfied at the time the panel issued Interim Award #4. Accordingly, the panel did not violate AAA Rule 46.

3. Functus Officio Doctrine

Petitioners argue that the panel exceeded its powers and manifestly disregarded the law by reconsidering prior determinations in violation of the functus officio doctrine. This doctrine holds that "once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration." McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 (9th Cir. 1982). "The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." Id.

Here, the functus officio doctrine does not apply because Interim Awards #4 and 5 were issued before the Final Award. Moreover, Soward's claims for breach of fiduciary duty, conversion, punitive damages, and attorneys' fees and costs were not the subject of Interim Awards #1-3. The panel specifically reserved jurisdiction over these claims in Interim Awards #1-3. Interim Award #1 at 9, 56; Interim Award #2 at 10; Interim Award #3 at 11. The panel expressly found that Soward's tort claims provided "a separate and independent ground for relief" from the accounting claim. Interim Award #4 at 20.

4. Piercing Corporate Veil

Lerner argues that the panel exceeded its powers by adjudicating an issue – i.e., piercing the corporate veil – that was not properly before the panel. Lerner argues that the panel held her personally liable for conversion based SLLB's actions as general partner of Cartesian, and, in particular, SLLB's failure to provide Soward with an accounting and distribution of his partnership interest in Cartesian. Lerner points out that the piercing the corporate veil issue "was never presented to the panel." Lerner's Mot. at 9:1. Lerner faults Soward for failing to add SLLB as a party to the arbitration and for failing to bring a piercing the corporate veil claim before the panel. This Court, however, faults Lerner for not raising the issue before the panel in defense of the conversion claim pled against her. At oral argument, Lerner's counsel admitted that Lerner did not bring this issue to the panel's attention. To the extent Lerner might have been shielded from liability under 6 Delaware Code § 18-303 for the actions of the SLLB, LLC in which her individual trust was a member, it was her burden to bring this law to the panel's attention. The panel did not manifestly disregard Delaware law governing LLCs because the issue was not presented to the panel.

5. Undisputed Facts

Lerner argues that the conversion award against her was "legally irreconcilable with the undisputed facts" and therefore in manifest disregard of the law and completely irrational. See Coutee, 336 F.3d at 1133. She fails to point to any undisputed facts,

however, that demonstrate Lerner's innocence. Lerner argues that "no evidence showed that Lerner was personally involved in the decision not to make a distribution of Soward's capital interest in Cartesian," Lerner's Mot., docket no. 33, at 10, but it is not this Court's role to peruse the voluminous evidentiary record that was before the panel.

The panel found that "Bosack and Lerner have taken possession of Soward's interest in Cartesian and converted it to their own interest, causing damage to Soward" and that Lerner "acted in concert with Bosack in implementing the scheme to strip Soward's capital account from Soward, . . . to transfer the account to Bosack," and "to eliminate Soward as a partner." Interim Award #4 at 23; Interim Award #5 at 3 (quoting Hearing Order No. 49). To the extent Lerner is alleging that these are unsubstantiated findings, unsubstantiated findings cannot form the basis for vacatur of an arbitration award. See Kyocera, 341 F.3d at 994. The Court cannot vacate the arbitration award based upon any failure of the panel to further detail Lerner's involvement in the specific conduct forming the basis for the conversion award.

6. Conclusion Re: Tort Awards

The Court confirms Interim Award #4 and the Final Award incorporating this award.

C. Punitive Awards

Petitioners, in seeking "exemplary and punitive damages" on their counterclaims inthe arbitration

against Soward, acknowledged that the panel possessed the authority to award punitive damages. Bromberg Decl., Ex. 2 at 27, ¶ 8; see also Bromberg Decl., Ex. 31 (AAA Rules) at 496 (AAA Rule 43 "Scope of Award," providing that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. . . . "). The panel ultimately concluded that punitive damages in favor of Soward were appropriate under California law because of the clear and convincing evidence of malice and oppression in failing to account for and distribute Soward's partnership interest in Cartesian after Soward's removal as general partner.

Petitioners argue that the punitive damages award is excessive and violates their due process. Because due process does not apply to arbitration awards, the Court cannot vacate the awards based on their excessiveness. See Barnes v. Logan, 122 F.3d 820, 824 (9th Cir. 1997); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063-1064 (9th Cir. 1991). Petitioners also argue that the panel improperly awarded punitive damages to punish litigation conduct. The arbitration awards do not bear this out; the panel repeatedly states in Interim Award #5 that they are awarding punitive damages for Petitioners' failure to account and distribute Soward's partnership interest to Soward within a reasonable time of Soward's removal as general partner. Petitioners also argue that the punitive damages award is irrational in light of the panel's finding made in connection with the accounting claim that Soward remained a partner in Cartesian between November 2003 and December 2006. The

Court has already concluded that the accounting and tort awards are not inherently contradictory, and, to the extent there are inconsistencies in the reasoning, such inconsistencies cannot form the basis of vacatur. Lerner argues that even if the conversion award is upheld, there was no evidence of malice, fraud or oppression. She also argues that the panel failed to assess her individual culpability. It is not the Court's role to review the evidence heard by the panel; unsubstantiated findings cannot form the basis for vacatur. Accordingly, the Court confirms Interim Award #5, Hearing Order No. 49, and the Final Award incorporating the punitive damages awards.

D. Attorneys' Fees and Costs

Petitioners move to vacate and remand the panel's award of fees and costs if the punitive damages award is vacated. Because the Court is not vacating the punitive damages award, and because the panel clearly had the authority to award attorneys' fees and costs under the arbitration clause, the Court confirms the panel's award of attorneys' fees and costs.

E. Pre-Judgment Interest

Soward's proposed order, docket no. 54, states that "Soward is entitled to prejudgment interest on the amounts awarded by the arbitrators that remain unpaid as of the date hereof," and states that "the applicable [California] law rate of interest is 10%." Bosack argues that "Soward's request for pre-judgment interest on the punitive damages award is

improper: California does not allow such interest on punitive damages." Bosack's Reply, docket no. 58, at 12 n.4 (citing Lakin v. Watkins Assoc., Indus., 6 Cal. 4th 644, 664 (1993)).

Soward argues that Lakin does not apply to arbitration awards, and that "post-award prejudgment interest is mandatory" under California case law. Soward's Reply, docket no. 62, at 7 (citing Pierotti v. Torian, 81 Cal. App. 4th 17, 27 (2000)). Unlike the claimant in Pierotti, Soward failed to move for pre-judgment interest in his motion to confirm the arbitration award. Cf. Pierotti, 81 Cal. App. 4th at 26-28. Furthermore, the panel was careful to indicate in the Final Award whether and to what extent the panel was granting prejudgment interest on the various awards. See Final Award at 7, Item ii ("The panel has set forth with respect to each claim the manner in which prejudgment interest ought to be computed, both with respect to the rate and the date from which interest ought to be calculated"); see also Final Award at 7-11, Items iii, v, vi, vii, x, xv, xviii-xx, xxv-xxvii; compare Final Award at 12, Items xxviii and xxix (awarding no pre-judgment interest on punitive damages). Soward is not entitled to post-award pre-judgment interest on the punitive damages awards.

III. CONCLUSION

The Court DENIES Petitioner Sandy Lerner's Motion to Vacate Certain Arbitral Awards Pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, docket no. 33, DENIES Petitioners Leonard Bosack, The Leonard Bosack Trust, Richard Troiano, The &

Trust, & Capital Partners, L.P., Cartesian Partners, L.P., The Leonard X. Bosack and Bette M. Kruger Charitable Foundation, Inc., and & Capital, Inc.'s Motion to Vacate Arbitration Awards, docket no. 40, and GRANTS David C. Soward's Cross-Motion to Confirm Final Arbitration Award, docket no. 52. The Court declines to award Soward post-award pre-judgment interest.

The Final Award issued by arbitrators J. Lani Bader and Zela G. Claiborne in the matter David C. Soward et al. v. The & Trust et al., No. 74 181 Y 00129 04 DEAR (as amended by Hearing Order No. 52), before the Commercial Arbitration Tribunal of the American Arbitration Association is hereby CONFIRMED.

IT IS SO ORDERED.

DATED this 25th day of February, 2008.

/s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

APPENDIX E

FINAL AWARD

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

DAVID C. SOWARD, an individual; & **MANAGEMENT COMPANY** Claimants and Counter Respondents and **THE & TRUST; SANDY LERNER,** Individually and as Trustee on behalf of the & Trust and the Sandy Lerner Trust; LEONARD BOSACK, individually and as Trustee on behalf of the & Trust and The Leonard Bosack Trust; RICHARD **TROIANO**, as Trustee on behalf of **THE &. TRUST; & CAPITAL PARTNERS, L.P.; CARTESIAN PARTNERS, L.P.; LEONARD BOSACK AND BETTE M. KRUGER**	**FINAL AWARD** No. #74 181 Y 00129 04 DEAR

FOUNDATION, a California corporation; and **& CAPITAL, INC.** Respondents and Counterclaimants	

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement contained in the Management Agreement ("Management Agreement") entered into between the parties on January 30, 2001, and effective as of January 1, 1999, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby make their FINAL AWARD as follows:

PRELIMINARY STATEMENT

In making our findings and award, we have considered the documentary evidence, the credibility of the witnesses, the expert testimony and reports, our views of the weight to be given to the documentary evidence and the testimony of the numerous witnesses including the experts and their reports, and the oral and written arguments of the parties. We have also considered the inferences that could, or could not, be drawn from the documents, the reports, and the testimony.

This is not a simple case. The complexity of the dealings between and among the various parties, and their failures at many levels and on many occasions

to document transactions or agreements, has rendered this proceeding time consuming and difficult, and led to the importance of evaluating the credibility of the witnesses, which is reflected in these findings and award.

1. Background

This is a complicated matter that has been the subject of five (5) Interim Awards. It has consumed in excess of sixty (60) hearing days over a period of more than two years. Four experts and approximately twenty six witnesses have testified. Three serial teams of lawyers have represented the Respondents and Counterclaimants. At the outset of the hearings, there were three Arbitrators on the Panel. However, when Respondents' third set of attorneys came into the case, one Arbitrator was disqualified due to various connections to the new firm. Thousands of pages of briefs and memoranda have been filed with the Panel, over five hundred exhibits were introduced into evidence, and countless hours have been consumed in argument.

The purpose of this Final Award is to bring this matter to an end. The Panel has decided all of the issues that have been raised by both parties, and which have been the subject of the Panel's five Interim Awards. All five are attached to this Final Award, and all of those awards in their totality are incorporated herein by reference.

The AWARD section of this Final Award sets forth in full the liability determinations made by the Panel in all five Awards. This award does not change

or modify in any manner any of the Panel's earlier determinations, but simply incorporates their substance. Having said that, there are two specific issues that Interim Award #1 specifically requires be dealt with in this Final Award: (i) "the proper interest under Delaware law and the manner of its calculation;" (see INTERIM AWARD #1, p. 56), and (ii) the amount of Soward's capital account in Cartesian (see INTERIM AWARD #1, p. 56).

The Panel made a determination that the amount of Soward's interest in the Cartesian partnership was $1,464,391 plus Interest, Because that amount was then paid promptly by the Claimant Respondents to Soward, we have shown the amount as satisfied in the list of individual items in the AWARD section of this Final Award. There is nothing further to be done with respect to our determination of the value of the Cartesian interest.

2. Attorneys' Fees and Costs

The Panel has decided that Soward is the prevailing party in this arbitration. Therefore, the one remaining issue to be determined is the amount of attorneys' fees and costs awardable to him. Both parties have filed extensive briefs with respect to the issue of attorneys' fees and costs and, on June 29, there was a hearing on the issue. The Respondents' position is that Soward is entitled only to attorneys' fees in connection with issues involving the & Trust Management Agreement. That Agreement contains the core underlying attorneys' fees and costs clause:

> "In the event of any dispute between the parties concerning any provision in this Agreement, it shall be resolved by arbitration under the rules of the American Arbitration Association. The arbitration shall be conducted in San Francisco, California, or in such other place as the parties may mutually agree. The arbitrator(s) shall have the authority to make an award based on the equities of the dispute, and such award may include attorneys' fees and costs to the party whom the arbitrator(s) determines to be equitably entitled to such attorneys` fees as the party primarily prevailing in such dispute."

Respondents take the position that, since the attorneys' fees and costs clause is found only in the & Trust Management Agreement, fees and costs may be awardable only in connection with issues that involve the Trust. That argument is without merit. At the inception of this matter the Respondents agreed to waive their argument that nothing other than claims under the Management Agreement were arbitrable, and consented to the inclusion in this arbitration of all their claims against Soward. It is hard to describe their decision as anything other than general consent to be bound by the provisions of the arbitration clause in the Management Agreement. That clause provides for an award of attorneys' fees and costs to the "party primarily prevailing in such dispute."

Further, both Soward in his demand and the Respondents in their answer asked for attorneys' fees

and costs. Pursuant to R-43 of the Commercial Arbitration Rules of the American Arbitration Association, the Panel may properly award both attorneys' fees and costs "if all parties have requested such an award. . . ." All parties have done so. Accordingly, it is clear to the Panel that it has the power to award attorneys' fees and costs to that party it determines to be the prevailing party, Claimant Soward.

Soward's attorneys have filed an extensive account of attorneys' fees and costs to Soward during the conduct of this case. Those fees and costs, in the aggregate, total $3,360,576.80, (not inducing AAA costs and fees) all incurred from the inception of this matter through May 31, 2007. Although the aggregate claimed by Soward is a large amount, it appears to be reasonable under the circumstances. This was an extremely contentious matter and unquestionably consumed enormous resources, both with respect to attorney time and properly chargeable costs. Accordingly, after a thorough review of the billings of counsel for Claimant, it is clear to the Panel that the requested amount is reasonable. Respondents have not contended otherwise.

The Respondents either want the amount of the fee reduced to reflect the fact that they won on four claims or, in the alternative, they want an award of attorneys' fees and costs that reflects their prevailing on some issues. The panel rejects both those approaches. We have determined that Soward is the prevailing party and entitled to reasonable fees and costs. The Panel, mindful of the equitable nature of

arbitration, believes that the only question is whether the amount requested by Soward is reasonable, given the loss of the Passport issue. The panel believes that it is and, therefore, we have awarded to Soward the full amount claimed by his attorneys.

Soward has requested that we allocate the amount of the attorneys' fees and costs claimed to those incurred, first, through INTERIM AWARD #3 and then from INTERIM AWARD #3 to the end of the case. The Panel has done so, and has awarded $3,004,741.37 for attorneys' fees and costs incurred through Interim Award #3 and $355,835.43 incurred thereafter.

3. Award

As set forth above, the purpose of this Award is to bring all of the individual determinations made by the Panel within a single Final Award. In accordance with the directions contained in INTERIM AWARD #1, the Panel has below set forth the proper interest rate under Delaware law that is to be used for the purpose of calculating interest with respect to each of the award items to which Delaware interest has application. The rate of Delaware interest is taken from Exhibit #1 of the memorandum entitled "Analysis of Prejudgment Interest Factors, September 27, 2006." That memorandum was filed by Messrs. Krum and Sellinger, counsel for Respondents, pursuant to the directions contained in § IV II. of the AWARD section of INTERIM AWARD #1.

Accordingly, based on the discussions both above and in INTERIM AWARDS numbers 1 through 5, the Panel unanimously AWARDS as follows:

i. This is a Final Award and is intended to be fully confirmable;

ii. Soward is herewith AWARDED and shall take from the Respondents, in the aggregate, exclusive of interest, but including an award of punitive damages and attorneys' fees and costs, the net sum of $24,435,895.90. This amount has been calculated by netting the individual amounts awarded both to Soward and to Respondents in the individual claims set forth below. It also includes the amount of $1,464,391, owed to Soward as his share of Cartesian, which has been paid to Soward and hence has been satisfied. In addition to such amount, Soward (and the Respondents with respect to those claims on which they prevailed) is also entitled to prejudgment interest. The panel has set forth with respect to each claim the manner in which prejudgment interest ought to be computed, both with respect to the rate and the date from which interest ought to be calculated.

iii. On his claim #1, Soward is herewith awarded against & Capital Partners the sum of $249,578, together with prejudgment interest commencing as of 90 days after the date of his termination, or

2/23/2004. Interest shall accrue from that date at the maximum Delaware rate of 7%.

iv. Soward's claim #2 regarding his share in the Cartesian partnership is dealt with herein under item xxiv.

v. On his claim #3, Soward is herewith awarded against & Trust the sum of $338,400. Both parties have agreed that California law has application to this claim; accordingly, that sum shall bear prejudgment interest from May 1, 2003, at the rate of 10% per annum.

vi. On his claim #4, Soward's Claim Against & Trust For Unpaid 2001, 2002, and 2003 Incentive Allocation Fees, Soward is hereby awarded against the & Trust the following sums:

(a) $532,263, together with prejudgment interest under California law commencing as of May 1, 2002, at the rate of 10%, for unpaid incentive allocation fees for 2001. The aggregate amount of interest at that daily rate shall be incorporated into the Final Award on Claim #4;

(b) $190,004, together with prejudgment interest under California law commencing as of May 1, 2003, at the rate of 10%, for unpaid incentive allocation fees for 2002. The aggregate amount of interest at that daily rate

shall be incorporated into the Final Award on Claim #4;

(c) $574,488, together with, prejudgment interest under California law commencing as of May 1, 2004, at the rate of 10%, for unpaid incentive allocation fees for 2003. The aggregate amount of interest at that daily rate shall be incorporated into the Final Award on Claim #4.

vii. On his claim #5, Soward is herewith awarded against the Bette Kruger and Leonard Bosack Foundation the sum of $55,802, together with prejudgment interest thereon from November 24, 2003, at the rate of 10% per annum.

viii. Counterclaim E is DENIED.

ix. Counterclaim F is DENIED.

x. Counterclaim G is GRANTED against Soward, and Soward shall pay to the Respondents on such claim the sum of $1,556,510, together with prejudgment interest at the rate of 7%, which is the maximum rate permitted under Delaware Law from July 17, 2003, the date on which & Capital terminated its interest in Passport.

xi. Counterclaim H is DENIED.

xii. Counterclaim I is DENIED.

xiii. Counterclaim J is DENIED.

xiv. Counterclaim K is DENIED.

xv. Counterclaim L is GRANTED and Soward shall pay to the Respondents with respect to such claim the sum of $150,000, plus prejudgment interest at the rate of 6.25% per annum, the maximum permitted rate of prejudgment interest under Delaware law, from February 27, 2002. The Panel herewith assigns to Soward the entire interest of & Capital Partners in the loan to Kemp and Soward is free to pursue his remedy against Kemp.

xvi. Counterclaim M Is DENIED.

xvii. Counterclaim N is DENIED.

xviii. Counterclaim O is granted, and Soward shall pay to & Capital Inc. the sum of $134,184, together with prejudgment interest thereon from November 24, 2003, at the rate of 10% per annum.

xix. Counterclaim P is GRANTED against Soward, and Soward shall pay Cartesian Partners the sum of $15,750.09 plus prejudgment interest at the rate of 6.25%, the maximum permitted rate under Delaware law from August 1, 2002.

xx. On & Capital's counterclaim with respect to the issues of Soward's alleged breach of his fiduciary' duties owed to & Capital with respect to the retention of the Westar funds in his personal Schwab account, the Panel finds for & Capital. Soward shall pay to & Capital the sum of $27,818.77, together with prejudgment interest in the amount of 7% per annum from November 21, 2003, until paid.

xxi. On Claimant Soward's claim for 10% of the proceeds received from the bankruptcy estate of Westar, the Panel finds for Respondent and Counterclaimant & Capital.

xxii. On & Capital's counterclaims relating to Soward's sitting on the board of directors of Westar and for recovery of his compensation as a director, the Panel finds for Soward.

xxiii. On & Capital's counterclaim with respect to the issue of Soward's alleged breach of his fiduciary duties owed to & Capital with respect to not timely disposing of the Wester investment, the panel finds for Soward.

xxiv. Soward is entitled to payment of $1,464,391 as his share of the assets of Cartesian as of September 30, 2006, with interest on the $1,464,391 at 10% from October 1, 2006, until paid. This amount

has been paid to Soward, and Cartesian's obligation with respect to the payment to Soward of his capital account has been satisfied. Soward for every purpose is deemed to have withdrawn as a partner of Cartesian.

xxv. On Soward's Seventh Claim, part one, breach of fiduciary duty (failure to account), Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum Delaware rate permitted by law from September 29, 2004, through December 14, 2006 or until paid, whichever is later. However, since such sum, plus interest, through December 14, 2006, is fess than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006 pursuant to INTERIM AWARD #4 ("the accounting amount'), this award shall be deemed satisfied.

xxvi. On Soward's .Seventh Claim, part two, breach of fiduciary duty (conversion), Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum Delaware rate

permitted by law from September 29, 2004, through December 14, 2006 or until paid, whichever is later. However, to the extent that such sum, plus interest, through December 14, 2006, is less than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006 paid to Soward pursuant to INTERIM AWARD #4 ("the accounting amount'), this award shall be deemed satisfied. If such amount of $1,001,101, plus interest through December 14, 2006, is greater than the accounting amount, Bosack individually and as Trustee, separately and collectively, shall pay the difference to Soward and & Management Company, with interest at the maximum rate permitted by Delaware law, until paid. As above, this amount has been paid to Soward and & Management Company and deemed satisfied.

xxvii. On Soward's Eighth Claim, conversion, Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, and Sandy Lerner, individually and as Trustee on behalf of the Sandy Lerner Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum rate permitted by California law from September 29, 2004, through December 14, 2006 or until paid, whichever is later. However, to the extent that such sum, plus interest, through

December 14, 2006, is less than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006 pursuant to INTERIM AWARD #3 ("the accounting amount"), this award shall be deemed satisfied. If such amount of $1,001,101, plus interest through December 14, 2006, is greater than the accounting amount, Bosack individually and as Trustee, and Lerner individually and as Trustee, separately and collectively, shall pay the difference to Soward and & Management Company, with interest at the maximum rate permitted by Delaware law, until paid. As above, this amount has been paid to Soward and & Management Company and deemed satisfied.

xxviii. The Respondent Leonard Bosack shall pay to Soward as and for Punitive Damages the sum of $10,999,494.00.

xxix. The Respondent Sandy Lerner shall pay to Soward as and for Punitive Damages the sum of $8,555,162.00.

xxx. The Respondents shall pay to Soward for attorneys' fees and costs for that period commencing with the inception of this dispute through INTERIM AWARD #3 the amount of $3,004,741.37.

xxxi. The Respondents shall pay to Soward for attorneys' fees and costs for the period commencing with the issuance of INTERIM

AWARD #3 to the end of the case the amount of $355,835.43.

xxxii. The administrative fees and expenses of the American Arbitration Association totaling $66,844.50, and the compensation and expenses of the Arbitrators totaling $1,472,183.17 shall be borne by Respondents. Therefore, Respondents, shall reimburse Soward the sum of $745,327.59, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Soward.

xxxiii. This Final Award includes a full settlement and determination of all claims and counterclaims submitted to the Panel in this arbitration. All claims not expressly granted are hereby deemed denied.

DATED: July 26, 2007

/s/ J. Lani Bader
Professor J. Lani Bader
Arbitrator

/s/ Zela G. Claiborne
Zela G.. Claiborne
Arbitrator

APPENDIX F

INTERIM AWARD 5

SUBJECT TO PROTECTIVE ORDER DATED MARCH 21, 2006

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

DAVID C. SOWARD, an individual; & **MANAGEMENT COMPANY** Claimants and Counter Respondents and **THE & TRUST; SANDY LERNER,** Individually and as Trustee on behalf of the & Trust and the Sandy Lerner Trust; LEONARD BOSACK, individually and as Trustee on behalf of the & Trust and The Leonard Bosack Trust; RICHARD **TROIANO**, as Trustee on behalf of **THE &. TRUST; & CAPITAL PARTNERS, L.P.;**	**INTERIM AWARD #5** No. #74 181 Y 00129 04 DEAR **Punitive Damages**

CARTESIAN PARTNERS, L.P.; LEONARD BOSACK AND BETTE M. KRUGER FOUNDATION, a California corporation; and **& CAPITAL, INC.** Respondents and Counterclaimants	

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement contained in the Management Agreement ("Management Agreement") entered into between the parties on January 30, 2001, and effective as of January 1, 1999, having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby AWARD as follows:

PRELIMINARY STATEMENT

In INTERIM AWARD #4, this Panel ruled on Claimant David Soward's ("Soward") claims against Respondent Leonard Bosack ("Bosack") for breath of fiduciary duty with respect to Cartesian Partners ("Cartesian") (claim 7) and Soward's claims against Respondent Bosack and Respondent Sandra Lerner (Lerner") for conversion of Soward's interest in Cartesian (Claim B). INTERIM AWARD #4 also incorporated by reference certain findings and determinations made by the Panel in Interim Awards 1 through 3. In turn, INTERIM AWARD #4 is Incorporated herein by reference.

Subsequent to the Panel's release of INTERIM AWARD #4, a hearing was held for the purpose of determining whether or not, on account of the actions of Bosack and Lerner, Soward was entitled to an award of Punitive damages against them. The Panel set forth its decision on that issue in Hearing Order #49. In Hearing Order #49, the Panel determined, among other things, that:

> For those reasons set forth in Interim Award #4, as well as the overarching conduct of both Lerner and Bosack throughout the period commencing with the firing of Soward In November, 2003 through the end of testimonial hearings in this matter, it is the belief of the Panel that it has been established by dear and convincing evidence that both Bosack and Lerner have acted with malice and oppression towards Soward, and that Soward is entitled to punitive damages from them. Although the Panel has found that Bosack was the architect of the scheme to strip Soward of his capital account in Cartesian, Lerner, as detailed in Award #4, was a willing participant in the creation of SLLB. She acted in conceit with Bosack in implementing the scheme to strip Soward's capital account from Soward and to transfer the account to Bosack. Both of them attempted to eliminate Soward as a partner at all.

On account of the findings made by the Panel that Lerner and Bosack acted with malice and oppression toward Soward, a hearing was held on May 10, 2007, for the purpose of determining the net

worth of Bosack and Lerner, so that the Panel could determine an appropriate amount of punitive damages. At that hearing, the Parties stipulated that the net worth of Bosack was $160,000,000 and that the net worth of Lerner was $153,000,000. After considering the arguments of the Parties and the applicable law, the Panel has concluded that the amount of Punitive damages that ought to be assessed against Bosack is $10,999,494 and against Lerner is $8,555,162.

DISCUSSION

The cases that have discussed the protocol that a trier of fact is obligated to follow with respect to the determination of an appropriate amount of punitive damages essentially establish a two stage process. First, one must consider the State and the public's interest in punishing the Respondents, and determine an amount that will have the proper deterrent effect and insure that the malicious and oppressive conduct is not repeated. Second, having determined what an appropriate amount is for the purpose of giving effect to policy of the *State*, one must determine whether or not the amount proposed is consistent with the Due Process standard of the 14th Amendment, as established by the US Supreme Court in *BMW v. Gore* (1996) 517 U.S. 559, and *State Farm v. Campbell* (2003) 123 S. Ct. 1513. Significantly, in *Rifkind & Sterling, Inc. v. Rilkind* (1994) 28 Cal. App. 4th 1282, 1290-1293, 33 Cal. Rptr. 2d 828, the court held that because of the lack of state action, a private contractual arbitration is not subject to the strictures of the due process clause. Notwithstanding *Rifkind*, the Panel has

endeavored to follow the due process guidelines set forth in *BMW v. Gore* and successor cases.

A. THE CALIFORNIA STANDARD

The California standard is succinctly set forth in Simon v. San Paolo (2005), 35 Ca1. 4th 1159:

> Where the defendants' oppression, fraud or malice has been proven by dear and convincing evidence, California law permits the recovery of punitive damages 'for the sake of example and by way of punishing the defendant." (Civ. Code § 3294, subd. (a).) As we explained in Nealfv v. Farmers Ins. Exchange, supra, 21 Cal. 3d at page 928, 148 Cal. Rptr. 389, 582 P.2d 980, and Adams v. Murakami, supra, 54 Ca1. 3d at 110-112, 284 Cal. Rptr. 318, 813 P.2d 1348, the defendants financial condition is an essential factor in fixing an amount that Is sufficient to serve these goals without exceeding the necessary level of punishment. "[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal v. Fanners Ins. Exchange, supra*, at 928, 148 Cal. Rptr. 389, 582 P.2d 980.)

After considering the import of *Simon*, supra, and the earlier case of *Adams v. Murakami* (1991) 54 Ca1. 3d 105, 109-1101, 284 Cal. Rptr. 318, 813 P.2d 1348 and other cases and law presented by counsel for both. sides; the briefs, arguments, and evidence presented by counsel for Lerner and Bosack and for

Soward; and the stipulation with respect to the net worth of Lerner and Bosack, the panel has determined that a punitive damages award of $10,999,494 against Based (and $8,555,162 against Lerner Would comport with the California policy of an award with sufficient sting to insure that given the net worth of the two Respondents - their bad actions will not be repeated. The panel has set forth those bad actions in INTERIM AWARD #4, including a specific finding that Lerner and Bosack acted with the intention of hurting Soward.

B. THE DUE PROCESS STANDARD

Having decided that the actions of Lerner and Bosack were such as to require the Imposition of a large punitive damages award under California law, the panel must determine whether or not the size of the award set forth above is consistent with the due process standards of *BMW v. Gore* (1996) 517 U.S. 559, 116 s.a. 15a9, 134 LEd.2d 809 (*BMW*), and *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513. Those two cases and their progeny set forth three standards against Which the award must be measured: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed In comparable cases." *(State Farm, supra*, 538 US. at p. 418, 123 S.Ct. 1513; see *BMW*, *supra*, 517 U.S. at 575, 116.S.2 1589.)

In both cases, the court emphasized that the most important factor was the first: the degree of reprehensibility of the respondents actions. And, in *State Farm*, the court took that analysis one step further, as explained in *Simon*.

In *State Farm*, the court summarized the subsidiary factual circumstances it believed particularly relevant to assessing reprehensibility:

> "We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an Indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct Involved repeated actions or was an isolated Incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm*, *supra*, at p. 419, 123 S. Ct. 1513.)

Measuring the actions of the Respondents against the five point scale of State Farm, we find the actions of Bosack and Lerner. Highly reprehensible. Although the first two items on the list are low on the scale with respect to impact on punitives because the harms here were economic, the last three items rank high on the list.

Soward was financially vulnerable. He testified that as a money manager, the ongoing arbitration completely destroyed his ability to earn a livelihood. Indeed, his financial statement (Ex. 4504) showed a

decline in his net worth (not including his house) during the period of the arbitration of approximately $6,000,000, completely eroding his finances. His arbitration related costs during that period totaled almost $4,000,000. He was literally being crushed financially by Lerner and Bosack.

The 4th item is also present. The actions of Lerner and Bosack were not isolated actions, but were repeated over time. INTERIM AWARD #4 documents those actions. The attempt to strip Soward of his interest In Cartesian was not a casual enterprise, but rather a planned, malicious, purposeful attempt to take Soward's interest in Cartesian away from him and convert it for Bosack's use.

The 5th item is also present to a high degree. The actions of Lerner and Bosack as set forth In Interim Award #4 were the result of "intentional malice, trickery, or deceit." Accordingly, the panel finds that the actions of Lerner and Bosack were highly reprehensible.

The second factor of BMW and State Farm is the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. Here, the panel has awarded Soward nine times the compensatory award of $1,222,166 against Bosack and seven times the compensatory award against Lerner. Given the trickery and deceit of Bosack and Lerner's actions and given the California mandate that those who engage in such actions be punished, it appears to be appropriate to get dose to the due process line. Given the large net worth of

both Lerner and Bosack, nothing short of that would have a sufficiently deterrent impact.

The last factor listed in *BMW* is the difference between the punitive damages awarded by the jury and the civil penalties authorized or Imposed in comparable cases. Instructive in this regard is *Bardis v. Oates*, (2004) 19 Cal.App.4th 1, 106. In awarding punitive damages, the Panel has also considered this factor.

In sum, the Panel has determined that the actions of Lerner and Bosack, as detailed in INTERIM AWARD #4, were highly despicable and, In order to properly give effect to the California mandate that those who act with malice and oppression to another ought to be punished, we AWARD as follows:

AWARD

1. This is an Interim Award and is not intended to be final. Accordingly, it is neither capable of being confirmed nor vacated. The panel presently has an attorneys' fees and costs hearing scheduled. When that hearing has been held and the Panel has determined each party's entitlement to attorneys' fees and costs (if any), a Final Award will be made which will dispose of all issues before the panel;

2. Soward is **AWARDED** against Bosack as punitive damages the sum of $10,999,494;

3. Soward is **AWARDED** against Lerner as punitive damages the sum of $8,555,162.

4. This Interim Award #5 is intended to dispose of all Issues with respect to punitive damages; the Panel still has before it the issue of attorneys fees and costs, which will be the subject of a further award.

DATED: July 26, 2007

/s/ J. Lani Bader
Professor J. Lani Bader
Chair

/s/ Zela G. Claiborne
Zela G.. Claiborne, Esq.
Arbitrator

APPENDIX G

INTERIM AWARD 4

SUBJECT TO PROTECTIVE ORDER DATED MARCH 21, 2006

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

DAVID C. SOWARD, an individual; & **MANAGEMENT COMPANY** Claimants and Counter Respondents and **THE & TRUST; SANDY LERNER,** Individually and as Trustee on behalf of the & Trust and the Sandy Lerner Trust; LEONARD BOSACK, individually and as Trustee on behalf of the & Trust and The Leonard Bosack Trust; RICHARD **TROIANO**, as Trustee on behalf of **THE &. TRUST; & CAPITAL PARTNERS, L.P.;**	**INTERIM AWARD #4** No. #74 181 Y 00129 04 DEAR Seventh and Eighth Claims for Relief by Claimants David C. Soward and & Management Company

CARTESIAN PARTNERS, L.P.; LEONARD BOSACK AND BETTE M. KRUGER FOUNDATION, a California corporation; and **& CAPITAL, INC.** Respondents and Counterclaimants	

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement contained in the Management Agreement ("Management Agreement") entered into between the parties on January 30, 2001, and effective as of January 1, 1999, having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby AWARD as follows:

PRELIMINARY STATEMENT

This INTERIM AWARD #4 rules on Claimant David Soward's (hereinafter "Soward") claims against Respondent Leonard Bosack ("Bosack") for breach of fiduciary duty with respect to Cartesian Partners ("Cartesian") (claim 7) and Soward's claims against Respondent Bosack and Respondent Sandy Lerner ("Lerner") for conversion of Soward's interest in Cartesian (Claim 8).

This INTERIM AWARD #4 incorporates by reference the prior (a) findings by the Panel as to Soward's claim for an accounting and distribution of his partnership interest in Cartesian at pages 13-19

of INTERIM AWARD #1 and (b) AWARD to Soward as to Cartesian at pages 56-57 of INTERIM AWARD #1 (claim 2).

This INTERIM AWARD #4 also incorporates by reference the prior (a) findings by the Panel as to the value of the assets of Cartesian and Soward's net interest in those assets as of September 30, 2006, and the (b) AWARD to Soward relating to his interest in Cartesian at pages 10-11 of INTERIM AWARD #3.

In making our findings and award in this INTERIM AWARD #4, we have considered the credibility of the witnesses, the documentary evidence relating to Cartesian, our views of the weight to be given to the documentary evidence and testimony of the various witnesses, and the oral and written arguments of the parties. We have also considered the inferences that could, or could not, be drawn from the documents and the testimony.

I. The Parties

Soward and & Management Company ("& Management") were the general partners of Cartesian from 1999 until purportedly terminated by Bosack on November 24, 2003. Soward owned a 4% capital interest in Cartesian and & Management a 1% interest. In the period 1999 to December 31, 2003, Soward's and & Management's capital interest in the partnership, as reported in Federal K-1s, increased from $332,863 in 1999, to $413,535 in

2000, $525,965 in 2001, $870,560 in 2002, and $1,001,101 in 2003.[23]

& Management is a company separate from Soward, incorporated in 1998, as shown by the records of the California Secretary of State. In his demand for arbitration Soward incorrectly described & Management as a sole proprietorship. In a complaint filed in the Washington Federal District Court, respondents Bosack and Lerner alleged that & Management is wholly owned by Soward and that there is such a unity of interest and ownership that the individuality, or separateness, of Soward and & Management has ceased and that adherence to the fiction of the separate existence of the corporation "would, under these particular circumstances . . . promote injustice" (Washington Complaint, par. 6). The Panel accepts this allegation as true. It treats Soward's claims as incorporating the rights of & Management. Hereafter, Soward and & Management are referred to collectively and separately as "Soward."

Leonard Bosack, respondent, is an individual. He is a trustee of the Leonard Bosack Living Trust dated February 24, 2001 ("Bosack Trust"), which has been the limited partner in Cartesian from its formation to date. In the period 1999 to December 31, 2003, the Bosack Trust's capital interest in the partnership, as reported in Federal K-1's, increased from $6,393,486 in 1999, to $8,015,726 in 2000, $9,659,840 in 2001, $12,020,940 in 2002, and

---

[23] The K-1s referred to in this AWARD are for tax years ending December 31.

$12,638,141 in 2003. In the same period, the total capital of both Bosack and Soward in the partnership, as reported in Federal K-1's, increased from $6,726,349 in 1999, to $8,429,261 in 2000, $10,185,535 in 2001, $12,891,500 in 2002, and $13,766,908 in 2003.

Sandy Lerner, respondent, is an individual. She is a trustee of the Sandy Lerner Trust ("Lerner Trust"), which is the owner of an interest in SLLB, LLC, which became general partner of Cartesian effective as of November 24, 2003, when Soward was terminated as general partner.

SLLB, LLC ("SLLB"), is a Delaware limited liability company. It is owned jointly by Bosack and Lerner. It substituted itself as general partner of Cartesian effective as of November 24, 2003. As shown on the K-1 for Cartesian for the year ending December 31, 2003, Bosack transferred $127,908 of the capital account of the Bosack Trust to SLLB in 2003. SLLB's interest in the partnership, as reported in the Federal K-1s, was $127,666, as of December 31, 2003. SLLB was the tax reporting partner for Cartesian for the years ending December 31, 2003, and December 31, 2004.

II. Cartesian

Cartesian is a limited partnership formed under Delaware law in 1999. From its formation in 1999 until the purported termination of Soward and & Management as general partners on November 24, 2003, Soward and & Management were the general

partners and the Bosack Trust was the sole limited partner.

Pursuant to an amended and restated partnership agreement, effective as of November 24, 2003, SLLB purportedly became the only general partner of Cartesian. The Bosack trust remained the sole limited partner.

In Interim Award #1, the Panel found that an agreement prepared by attorney Robert Wood in 1999 and presented to Bosack ought to provide the relevant terms of the partnership agreement (page 16) and, accordingly, to provide the basis of Soward's rights as to Cartesian (page 17).

III. Background and Procedural History

In the fall, 2002, Soward asked Bosack and Lerner to extend his contract and increase his compensation as investment manager of the & Trust. His contract was expiring the next year.

In the spring, 2003, Bosack and Lerner tasked an accounting firm, Clark Nuber in Seattle, in review Soward's performance in the & Trust and Bosack and Lerner-related entitles.

In the fall of 2003, Bosack and Lerner decided to terminate Soward from all his positions with their entities. Bosack, as limited partner, also decided to terminate Soward as general partner of Cartesian.

On November 24, 2003, Bosack through his lawyers told Soward that he was terminating Soward

as general partner of Cartesian. Bosack, through his lawyers, sent notice to the depositary bank that held Cartesian's account that (i) Soward and & Management were no longer authorized to take any action with the bank with respect to the Cartesian account, (ii) any powers of attorney, any appointments of Soward and & Management as agents of Cartesian, and any similar grants of authority, had also been revoked, and (iii) Soward was no longer the general partner of Cartesian (Ex. 3729). The notification instructed the bank to notify its staff of the revocation of authority and change of the general partner. A Similar notice was sent to an investment house in England.

On February 5, 2004, Soward and & Management filed a demand for arbitration against, so far as here relevant, Lerner individually and on behalf of the Lerner Trust, Bosack individually and on behalf of the Bosack Trust, and Cartesian. Soward and & Management asserted claims for dissolution of Cartesian, an accounting, and compensatory damages.

In July 2004, Bosack and Lerner filed a complaint in the United States District Court for the Western District of Washington against Soward and & Management, alleging a number of causes of action, including as to Cartesian, that all funds that defendants contributed to Cartesian as capital were improperly taken from another partnership and that Soward had no lawful interest in Cartesian.

In September 2004, SLLB, the new general partner of Cartesian, filed a tax return for 2003 with

the Internal Revenue Service showing that Soward had a capital account as of the end of 2003 of $1,001,101, with Bosack having a capital account of $12,638,141, and SLLB a capital account of $127,666.

In October 2005, without telling Soward, SLLB filed a tax return for 2004 with the Internal Service reducing Soward's capital account to $135,889 or in the alternative to zero, transferring $865,212 from the $1,001,101 Soward capital account to the Bosack Trust capital account. The books and records of Cartesian showed that the capital account of Soward remained at $1,001,101.

At the same time, the SLLB return reduced the value of one of the three investments of Cartesian, SG Securities-Liberty, as reported to the IRS by $3,429,113, changing the value from fair market value to cost.

Cartesian, Bosack, Lerner and SLLB did not produce an accounting at any time for Cartesian until ordered to do so by the Panel in its Interim Award #1 on September 7, 2006. On December 12, 2006, the Panel found that the value of Soward's interest was $1,464,391 as of September 30, 2006. The Panel is informed that Bosack or SLLB, it is not clear which, paid $1,464,391, plus interest from October 1, 2006, to Soward on December 14, 2006.

In March 2006, the Panel allowed Soward to amend his claim for relief as to Cartesian, adding a claim for breach of fiduciary duty as to Bosack for failing to provide an accounting and converting

Soward's interest in Cartesian (Seventh Claim) and a separate claim for conversion against Bosack and Lerner for converting Soward's interest in Cartesian to their own use (Eighth Claim). Soward also alleged claims for punitive damages relating to the Seventh and Eight claims. The punitive damages issues are deferred until a later date, per the Panel's Hearing Order No. 40.

IV. Seventh Claim: Breach of Fiduciary Duty

When Bosack decided to terminate Soward and & Management as General Partners of Cartesian (collectively "Soward"), he had no signed agreement which permitted him to do so. He was left with Delaware Limited Partnership law, which required a court order, or the Wood agreement, which provided that upon cessation of any general partner's status as general partner other than as a result of a transfer, such general partner interest would be converted into a limited partner interest.

When Bosack nonetheless decided to terminate Soward immediately and to substitute himself and Lerner through SLLB as the general partner, and to expel Soward entirely from the partnership, he and Lerner were met within two months with a demand for arbitration. The demand sought an accounting for Soward's interest in Cartesian.

Before that time, Bosack and Lerner had hired Clark Nuber to investigate Soward. Clark Nuber did so for a period of approximately nine months. Bosack's and Lerner's lawyers were also involved

from time to time in the investigation. Clark Nuber was the regular accounting firm for Cartesian and prepared its tax returns.

In July 2004, Clark Nuber asked the IRS for an extension of time to file the return and related schedules for the partnership, "in order to gather information necessary to assure preparation of a complete and accurate tax return" (Ex. 4370).

A short time later, also in July, Bosack and Lerner filed lawsuit in the Federal District Court in Seattle alleging that Soward had improperly taken his capital contribution to Cartesian from another limited partnership, where he was the general partner and where the Bosack Trust and the Lerner Trust were the limited partners. The complaint alleged that the only capital ever contributed by Soward to Cartesian belonged to the plaintiffs and that Soward had no lawful interest in the partnership. This allegation was false, because Soward had contributed $25,000 of separate funds to the partnership, apart from funds transferred from his account with the other partnership.

In late September 2004, the accountants had completed their work and Cartesian filed its tax return for the year ending December 31, 2003, the year in which Soward was terminated. SLLB signed the tax return as general partner. The evidence does not show whether Bosack or Lerner signed for SLLB, but it is reasonable to infer from the way things were handled in the partnership that Bosack signed the return. The return contained the usual statement under penalty of perjury by the general partner that

the general partner had examined the return, including the accompanying schedules, and that to the best of its knowledge the return was true, correct, and accurate. The Schedule K-1s for the return showed a total capital of $13,766,908 for the partnership, with $12,638,141 allocated to the Bosack Trust, $1,001,101 allocated to Soward, and $127,666 allocated to SLLB.

It was plain from the demand for arbitration filed seven months earlier that Soward wanted an accounting and to be paid for his interest in Cartesian.

In the summer of the next year, 2005, Clark Nuber began preparing the partnership return for the year ending December 31, 2004, the first full year in which Soward was no longer the general partner or, in Bosack's view, a limited partner. They prepared the return the same way as they had done the year before, carrying over the ending capital balance for the partners, adding in the profits or losses, and then computing the respective capital accounts. As to Soward, they froze the value of his capital account as of the end of the prior year, to reflect that he was no longer sharing in the profits and losses. The draft showed that the value of his account was unchanged from the prior year.

When Lerner's accountant in Virginia, Mr. Middleton, received the draft, he pushed back, telling the accounting firm that Cartesian's position was that Soward had no capital account. He said that the funds that Soward had used to fund his account were almost all improperly withdrawn from the other

partnership. He came close to repeating the false statement in the Washington Federal Court suit that the "only" capital contributed to Cartesian belonged to Bosack and Lerner, but stopped short. He tacitly admitted to the accountants that at least some funds were not improperly withdrawn and belonged to Soward.

At some point shortly thereafter, Bosack and his attorneys became personally involved in the preparation of the partnership return. Middleton, acting for Bosack, told the accountants to move the amount that was previously recorded as Soward's capital account over to Bosack as of January 1, 2004. The accountants did as they were told, sending a second draft of the tax return showing that the million plus dollars listed for Soward's capital account had been transferred to Bosack's capital account. No funds were transferred to SLLB's capital account.

Apparently, this wholesale transfer to Bosack was too much. Bosack's attorneys requested still another version of the tax return. In an e-mail to Clark Nuber, Middleton wrote: "They now want to show Mr. Soward with $135,000 in his capital account" (Ex. 4385). The balance of $866,101 was transferred to Bosack's account.

However, to protect Bosack and SLLB, Middleton or one of Bosack's attorneys, it is not dear who, told the accountants to attach a paragraph to the end of the tax return that said: "In the alternative Leonard Bosack has a capital account of $10,187,866 and David Soward has a capital account of $0.00. The

issue whether David Soward is entitled to a partnership interest in the partnership, and if so, the amount of his capital account, if any, is the subject of a pending arbitration proceeding" (Ex. 4370). An accountant from the accounting firm testified that this note was highly unusual. It put Cartesian and Soward at risk with the IRS. The note did not point out that Soward was claiming an interest of at least $1,000,101 in the capital of the partnership. More importantly, it did not point out that the books and records of the partnership had continued to show this amount as Soward's interest. Nor, according to Middleton, who took over preparation of the books and records, were they ever changed.

Bosack was kept personally apprised of the transfer of the $866,101 of Soward's capital interest on the tax return. He then signed the tax return, under oath, on behalf of SLLB. The evidence did not show whether Lerner personally knew of these events when they occurred. However, when they surfaced in the arbitration, she did not disavow them.

Middleton testified that he instructed Ms. Norgaard, Bosack's in-house bookkeeper in Seattle, to send the 2004 K-l, showing Soward's interest reduced to $135,889, to Soward. This instruction was contrary to the practice in prior years, where the accounting firm sent the K-1s to Soward. Norgaard testified that she never received the K-l for 2004. Soward testified that he did not receive the K-l showing his reduced interest for over a year and half until produced in the arbitration proceedings.

In addition to transferring Soward's interest to Bosack, SLLB reduced the value of SG Securities-Liberty, one of the three Investments of Cartesian, on the tax return by $3,429,713, changing the value from fair market value to cost. This publicly traded company was one of the investments for which Soward was seeking payment in the accounting. It was also an investment for which his management judgment was being challenged in the arbitration by Bosack. Over the five years that this investment, made by Soward as general partner, was recorded in Cartesian's returns, its fair market value had increased from $5,897,943 in 2001 to $8,137,887 in the year ending December 31, 2002, and to $9,020,962 in the year ending December 31, 2003, when Soward was terminated. There was no testimony showing that this change from fair market value to cost was consistent with generally accepted accounting principles.

Discussion

The claim for breach of fiduciary duty is made against Bosack individually and as trustee on behalf of the Leonard Bosack Trust, the limited partner in Cartesian.

The claim has two parts, one for alleged breach of fiduciary duty by failing to make an accounting of Soward's interest in Cartesian, the other for converting Soward's interest in Cartesian to his own without justification, without providing an accounting, and without legal authority.

1. **First Part: Accounting**

Under Delaware law, which the parties have stipulated is applicable to the Cartesian partnership, a limited partner has fiduciary duties to the general partner where, as here, the general partner is terminated and the limited partner assumes control of the assets of the partnership. A non-judicial termination effects a dissolution of the partnership. Here Bosack made a non-judicial termination of the partnership with Soward. He took over its assets, forbidding the principal bank holding those assets, and a large foreign investment house, to have any further dealings with Soward on behalf of the partnership. At that point, Bosack, individually, and the Bosack Trust through which he acted; held the assets of the partnership in trust, as a fiduciary.

Under Delaware limited partnership law, under less extreme circumstances as where a general partner voluntarily withdraws from the partnership, the remaining limited partner or partners have a duty to account for, and pay over, to the withdrawing partner his or her share in the assets of the partnership within a reasonable time. Section 17-604 of the Delaware code provides guidance:

> ". . . upon withdrawal any withdrawing partner . . . is entitled to receive, within a reasonable time after withdrawal, the fair value of such partner's partnership interest in the limited partnership as of the date of withdrawal based upon such partner's right to share in distributions from the limited partnership."

The & Capital Partners, LLP, agreement, in which the Bosack Trust was a limited partner, and which Bosack claimed to be the applicable partnership agreement for Cartesian, though not reduced to writing, similarly provided for a prompt accounting to the general partner and distribution of his or her share of the assets on termination:

> "After the . . . removal of the General Partner [at any time with or without cause), there shall be distributed to the General Partner any positive balance in the Fair Value Capital Account of the General Partner, or nothing if such balance is zero or negative. All such distributions shall be made no later than the later to occur of (i) the end of the taxable year in which occurs the . . . removal of the General Partner and (ii) 90 days after the date of such . . . removal, except that reserves reasonably required to provide for liabilities may be retained so long as such reserves are distributed as soon as practicable thereafter. The General Partner shall be entitled to no other distribution or payment from the Partnership (including, without limit, severance payment) at such time of termination of his management of the Partnership, or at any time thereafter" (Ex. 3017, par. 5.8).

Here, Bosack did not provide a prompt accounting or distribution of Soward's share of the assets in Cartesian. In explaining why he and Lerner had not done so with regard to the termination of Soward as General Partner of & Capital Partners, he testified

that "we [Bosack and Lerner] should have provided it as soon as were able to provide an approximation of it, but certainly after he sued us, he wasn't going to get much. Somehow being sued disimproves one's mood with regard to these things . . . ." The Panel finds that Bosack, individually and through the Bosack Trust, took the same approach in failing to provide an accounting and distribution to Soward for his interest in Cartesian within a reasonable time.

As to Cartesian, the failure was aggravated by the fact that within ten months of the termination, SLLB, the new general partner, filed a tax return with the Internal Revenue Service, stating under penalty of perjury that Soward's capital interest in the partnership was $1,001,101 as of December 31, 2003. SLLB's accountants, Clark Nuber, who had been the accountants for the former Cartesian partnership when Soward was acknowledged to be the general partner, had obtained additional time from the IRS for SLLB and Bosack to file the return, to assure preparation of a complete and accurate tax return. Unless Bosack was lying to the IRS, the Panel finds that Bosack and the Bosack Trust, as the limited partner, knew the value of Soward's interest in Cartesian as of September 29, 2004, the date that SLLB signed its return.

Bosack contends that he and the Bosack Trust were excused from making an accounting when Soward filed his demand for arbitration, which prayed for an accounting. Bosack contends that he could not know how much to pay, if anything, until the Panel made its ruling as to whether Soward ever had a legitimate interest in Cartesian. However, this

assertion contradicts the representation in the Federal Tax return. The Panel finds that this assertion was both false and made in bad faith. It further finds that the failure by Bosack to provide an accounting to Soward was done for the purpose of making it as difficult as possible for Soward to receive his funds in Cartesian and to hurt him.

That breach of fiduciary duty is further exacerbated by Bosack's role in manipulating the tax returns filed for the succeeding fiscal year, reducing the amount Soward's interest in Cartesian as of December 31, 2003, from $1,001,101 to $135,889 as a maximum. Bosack caused this reduction to be made in the tax return, even though, as testified by Middleton, the underlying books and records of Cartesian were never changed and continued to show Soward's interest at $1,001,101.

Bosack states that the change in the tax return was made to reflect Bosack's and the Bosack Trust's litigation position, and that he was damned no matter what he did: if he showed the interest at $1,001,101 claimed by Soward, this would benefit Soward in the litigation as to the value of his interest; if he did not, he, the Bosack Trust, and SLLB would not be telling the truth as to their view of the value of Soward's interest. He pointed to an attachment to the SLLB tax return, prepared by Middleton or his attorneys (it is not clear which, both claimed credit), that in the alternative Soward had a capital account of zero and stating that the issue of whether Soward is entitled to partnership interest in the partnership and, if so, the amount of his capital

account, if any, is the subject of a pending arbitration proceeding.

Bosack's disclosure to the IRS was disingenuous and a half truth. Bosack did not disclose, nor cause SLLB to disclose, to the IRS that he had unilaterally caused over three quarters of a million dollars to be diverted from Soward's account on the tax return to his own account, while the books and records of Cartesian still showed that Soward's interest in Cartesian was the same as the year before. Likewise, he did not disclose that Soward was claiming in the pending arbitration proceeding that his capital account was over $1 million dollars. While Bosack went to expense and effort to file the addition to the tax return, he stopped short of telling the entire truth. In doing so, he breached his fundamental fiduciary duty to Soward of being honest and straightforward. Instead of letting the chips fall where they may, he used the tax return to advance a litigation position, regardless of what the underlying books and records of the partnership might show.

The failure to pay to Soward, within reasonable time, time, the value of his capital interest in Cartesian was likewise an egregious, willful breach of fiduciary duty. This failure lies at the feet of Bosack and the Bosack Trust, through which he acted. We find that the value of Soward's capital as of December 31, 2003, was due and payable to him as of September 29, 2004—i.e., $1,001,101. This was the date of the Federal Tax Return signed by SLLB. The Panel finds that Soward is likewise entitled to interest on that amount from September 30, 2004, at

the applicable rate under Delaware law, to December 14, 2006. To the extent that the total sum, including interest when computed, is less than the amount ultimately awarded to Soward by the Panel on the accounting and paid on December 14, the liability will be deemed satisfied.

Bosack contends that Soward was not damaged by the failure to make an accounting because Soward was ultimately paid in the end, after the Panel made its award on the accounting on December 12, 2006. We find this contention to be without merit. Soward was damaged from the time that he was entitled to receive the distribution of his interest in Cartesian. He was deprived of the use of those funds for the support of himself and his family, or for whatever other purposes he might choose put them. The fact the he received them in the end did not undo the damage from not having the funds in the meantime.

As a further illustration of Bosack's breach of fiduciary duty, it was clear that Soward had put $25,000 in cash into Cartesian in 1999, no matter what the source might have been of his other capital contributions. In the period ending December 31, 2003, that investment had grown to $135,889. However, in the complaint filed in the Washington Court, Bosack claimed that the only funds put into Cartesian had come from Soward's capital account at & Capital Partners. By October 2005, in the preparation of the tax return, even Middleton, the accountant working with Bosack and his team of attorneys, recognized that Soward had at least some interest in his capital account through funds from independent sources. In the end, the attorneys

directed that the tax returns show Soward with $135,889 in his capital account.

However, Bosack refused to pay even the $135,000 to Soward—an infinitesimal amount compared to Bosack's wealth—making Soward spend time, effort and resources for another year to prove his right to the money. There could be no bona fide dispute as to his right to the $135,889. Bosack's position did not even pass the smell test of his lawyers. Bosack claimed that he was being conservative in even allowing that Soward might have an interest in the $135,889, rather than zero. If anything, he was being duplicitous with funds held as a fiduciary.

Bosack's conduct fell far short of applicable standards under Delaware law, wholly apart from the general standards articulated long ago by Chief Justice Cardozo in the leading case of Meinhard v. Salmon (1928) 129 N.Y. 458, 464:

> "Many forms of conduct permissible in a workaday world, for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

In summary, the Panel finds that Bosack, and the Bosack Trust, are liable for an intentional breach of fiduciary duty in failing both to account to Soward for the value of his interest in Cartesian within a

reasonable time and to pay him the value of that interest. As noted, giving the benefit of the doubt to Bosack to allow for careful checking of the capital accounts, the Panel finds that a reasonable time was September 29, 2004.

2. Second Part: Conversion

This part of the award addresses Soward's claim that Bosack breached his fiduciary duty to Soward by converting Soward's interest to his own without justification, without providing an accounting, and without legal authority.

Like claim 1, this claim of breach of fiduciary duty is subject to Delaware law. However, the Panel's ruling on this claim of breach of fiduciary duty is independent of, and separate from, its ruling on claim 1 on failure to make an accounting. It is a separate and independent ground for relief. The Panel therefore does not incorporate its ruling on claim 1 but starts afresh.

When Bosack terminated Soward as general partner of Cartesian, he took over all the assets of Cartesian. First, he instructed the bank principally holding those assets, as well as a European investment house, to have nothing to do with Soward. Second, Bosack and his wife, Lerner, formed SLLB, a corporation, to be the general partner. SLLB then took control of the assets.

The assets were not mere choses in action or book entries. They were existing properties reported as such on the tax returns of the partnership.

When Soward requested an accounting for his interest in the specific assets, Bosack and Lerner refused to provide one. They also refused to turn over any part of the assets to Soward, claiming them as their own. Bosack then went so far as to cause a false tax return to be filed with the IRS as to the amount of Soward's interest—reducing the amount from $1,001,101 to $135,889 at the maximum. This tax return reflected Bosack's and SLLB's litigation position with Soward in the present arbitration, rather than the underlying books and records of the partnership.

The tax return did not affect a transfer of the assets. However, it showed malice by Bosack and SLLB toward Soward. Bosack and SLLB did not even cause the books and records of Cartesian to be changed to reflect honestly their litigation position. They would have been expected to do so if they truthfully thought that the litigation position had any merit.

Further evidencing his breach of fiduciary duty to Soward, Bosack did not even tell Soward about the change in the tax return at the time, even though Bosack was sitting across the table from Soward, looking him in the face, at the arbitration proceeding. Bosack and SLLB claimed that they never told Soward about the false tax return because Soward never asked. But the evidence showed that Bosack and SLLB never sent the changed K-1 to him.

Here the breach of fiduciary duty was taking over the assets of Cartesian and treating them as

belonging to Bosack and to SLLB, and then exercising dominion and control over them. Bosack and SLLB intentionally kept the assets from Soward.

Under Delaware law, conversion is the wrongful exercise of dominion over the property of another, in denial of his or her right, or inconsistent with it.

Bosack contends that there could be no conversion and thus no breach of fiduciary duty in failing to turn over to Soward his interest in the capital of the partnership, because his capital was only reflected in a book entry of the partnership. But the books only listed the assets of the partnership. The conversion was not of the book entries, but of the assets which were reflected in the books. Bosack never contended that such assets did not exist.

The Panel finds that Bosack breached his fiduciary duty as sole limited partner and as an owner of SLLB, the new general partner, in excising dominion and control over the assets of Cartesian, in derogation of Soward's rights. The Panel further finds that such breach of fiduciary duty was intentional.

As to damages, Panel finds that Soward was damaged by this breach of fiduciary duty and that the amount of the damage was the value of Soward's interest in the assets as of December 31, 2003—$1,001,101—plus interest from September 29, 2004, the date on which SLLB signed its Federal Tax Return for calendar year 2003, to December 14, 2006. The interest shall be calculated at the applicable rate under Delaware law. To the extent that the damage,

plus interest, is less than the $1,464,391 paid to Soward on December 14, 2006, as a result of the accounting in Interim Award #3, the damage claim for breach of fiduciary duty for conversion shall be deemed satisfied as of December 14, 2006.

V. Eighth Claim: Conversion

The Eighth Claim for relief asserts that Bosack and Lerner have taken possession of Soward's interest in Cartesian and converted it to their own interest, causing damage to Soward.

The Eighth Claim recites that it incorporates by reference the allegations of the Seventh Claim and all the other allegations of Soward's previously filed demand for arbitration. However, the Panel is deciding this claim separately from the Seventh claim and Soward's other claims. Pursuant to stipulation by the parties, this Eighth Claim is subject to California law.

When Bosack terminated Soward as general partner of Cartesian, he designated SLLB, a limited liability company, as the replacement general partner. Bosack and Lerner controlled SLLB.

Bosack and Lerner caused SLLB to become the general partner effective as of November 24, 2003, the date Bosack terminated Soward. Soward's demand for arbitration filed February 5, 2004, demanded an accounting for his interest in the property of Cartesian. At the time, the property consisted of three investments: stock in SG Securities, a limited partnership interest in T. Weisel

Capital Partners, and an investment interest in Active Value Capital. Altogether, these three investments totaled $13,391,494. The balance of the assets consisted of cash and receivables, totaling an additional $375,414. The aggregate value of the assets was $13,766,908. Soward's share of the assets was $1,001,101.

When Bosack, through the Bosack Trust as limited partner and thorough SLLB, and when Lerner through SLLB, took over as of November 24, they appropriated these assets to their own use, denying Soward any control over them. Bosack instructed two holders of the assets, including a bank, to have nothing to do with Soward. Further, Bosack and Lerner, through SLLB, began to use the assets for paying the operating expenses of their new partnership, including attorney's fees.

When Soward demanded that Bosack and Lerner turn over to him his interest in the assets, they refused to do so. SLLB went so far as to file a false partnership tax return with the Internal Revenue Service for calendar year 2004 which showed Soward's portion of the specified assets as being no more than $135,889, down from the $1,001,101 the year before. The books and records of the new partnership continued to show Soward's interest in the same amount as before. While filing of the false tax return did not itself constitute a conversion of Soward's interests in the assets, it showed a knowing and callous indifference to his rights in the property.

Under California Law, a conversion is the wrongful exercise of dominion over the personal

property of another, after a demand, accompanied by damage. As long ago as 1948, the California Court of Appeal held that the refusal by a transfer agent to transfer ownership of shares of stock on the books of a corporation in derogation of the rights of the owner could be deemed a conversion (Mears v. Crocker First Nat. Bank (1948) 84 Cal. App. 2d 637, 644–645). The Court referred to the long standing rule that "'[a]ny act of ownership or exercise of dominion over the property of another, in defiance of his rights, is a conversion of that property'" (p. 645). The Court further noted that it is not necessary to a conversion that there should be a manual talking of the thing in question. Other case law leads to a similar conclusion.

Here, Bosack and Lerner through SLLB did not just interfere with the dominion of Soward over a small part of his partnership interest in a small amount of specific property, but all of it. We find that their actions, separately for Bosack and through SLLB for Bosack and Lerner, in failing to turn over to Soward his interest in the assets of Cartesian within a reasonable time was willful conversion. We find each individually responsible for the actions of SLLB.

We find that a reasonable time to turnover the assets was no later than September 29, 2004. This was the date when SLLB signed a tax return with the Internal Revenue Service identifying Soward's interest at $1,001,101. This was the effective final date of the conversion. We find that Soward is entitled to interest on that sum in the maximum amount permitted by California law, 10%, until paid.

To the extent that the aggregate of principle and interest is less than the $1,464,391, plus interest, paid to Soward on December 14, 2004, in settlement of the accounting, the award shall deemed satisfied.

VI. AWARD

Based on the foregoing, the Panel hereby unanimously AWARDS as follows.

1. This is an interim award. It is not intended to be confirmable until it is incorporated into a final award.

2. On Soward's Seventh Claim, part one, breach of fiduciary duty (failure to account), Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum Delaware rate permitted by law from September 29, 2004, through December 14, 2006, or until paid, whichever is later. However, to the extent that such sum, plus interest, through December 14, 2006, is less than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006, pursuant to INTERIM AWARD #3 ("the accounting amount"); this award shall be deemed satisfied. If such amount of $1,001,101, plus interest through December 14, 2006, is greater than the accounting amount, Bosack individually and as Trustee, separately and collectively, shall pay the difference to Soward and & Management Company, with interest at the

maximum rate permitted by Delaware law, until paid.

3. On Soward's Seventh Claim, part two, breach of fiduciary duty (conversion), Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum Delaware rate permitted by law from September 29, 2004, through December 14, 2006, or until paid, whichever is later. However, to the extent that such sum, plus interest, through December 14, 2006, is less than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006, pursuant to INTERIM AWARD #3 ("the accounting amount"), this award shall be deemed satisfied. If such amount of $1,001,101, plus interest through December 14, 2006, is greater than the accounting amount, Bosack individually and as Trustee, separately and collectively, shall pay the difference to Soward and & Management Company, with interest at the maximum rate permitted by Delaware law, until paid.

4. On Soward's Eighth Claim, conversion, Claimants David Soward and & Management Company are hereby awarded against Leonard Bosack individually and as Trustee of the Leonard Bosack Trust, and Sandy Lerner, individually and as Trustee on behalf of the Sandy Lerner Trust, separately and collectively, the sum of $1,001,101, together with prejudgment interest at the maximum rate permitted by California law from September 29, 2004, through December 14, 2006, or until paid,

whichever is later. However, to the extent that such sum, plus interest, through December 14, 2006, is less than the sum of $1,464,391, plus interest, paid to Soward on December 14, 2006, pursuant to INTERIM AWARD #3 ("the accounting amount"), this award shall be deemed satisfied. If such amount of $1,001,101, plus interest through December 14, 2006, is greater than the accounting amount, Bosack individually and as Trustee, and Lerner individually and as Trustee, separately and collectively, shall pay the difference to Soward and & Management Company, with interest at the maximum rate permitted by California law, until paid.

5. This Interim Award includes a full settlement and determination of all claims submitted to the Panel by the Seventh and Eighth claims of Soward and & Management Company in this arbitration, except for (1) claims for punitive damages and (2) claims for attorney's fees and costs. All other claims included in the Seventh and Eighth claims submitted to this Panel are hereby denied.

6. The Panel reserves jurisdiction over this arbitration proceeding for all purposes until entry of the Final Award herein.

DATED: January 25, 2007

/s J. Lani Bader
Professor J. Lani Bader
Chair

/s Zela G. Clairborne
Zela G. Clairborne
Arbitrator

/s Thomas J. Klitgaard
Thomas J. Klitgaard
Arbitrator

APPENDIX H

MOTION TO STAY ORDER

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF THE ARBITRATION BETWEEN,

LEONARD BOSACK; SANDY LERNER; CARTESIAN PARTNERS LP; THE LEONARD BOSACK TRUST; THE SANDY LERNER TRUST; RICHARD TROIANO; THE & TRUST; & CAPITAL PARTNERS; THE LEONARD X. BOSACK AND BETTE M. KRUGER CHARITABLE FOUNDATION, INC.; CAPITAL INC,

Petitioners - Appellants,

v.

DAVID C. SOWARD; & CAPITAL MANAGEMENT COMPANY,

Respondents - Appellees.

No. 08-35248

D.C. No. 2:07-CV-00574-TSZ Western District of Washington, Seattle

ORDER

Filed Oct. 29, 2009

IN THE MATTER OF THE ARBITRATION BETWEEN,

LEONARD BOSACK; SANDY LERNER; CARTESIAN PARTNERS LP; THE LEONARD BOSACK TRUST; THE SANDY LERNER TRUST; RICHARD TROIANO; THE & TRUST; & CAPITAL PARTNERS; THE LEONARD X. BOSACK AND BETTE M. KRUGER CHARITABLE FOUNDATION, INC.; CAPITAL INC,
Petitioners - Appellants,

v.

DAVID C. SOWARD; & CAPITAL MANAGEMENT COMPANY,
Respondents - Appellees.

No. 08-35458

D.C. No. 2:07-CV-00574-TSZ
Western District of Washington, Seattle

Before: CANBY, THOMPSON and N.R. SMITH, Circuit Judges.

Petitioners-Appellants' motion to stay the mandate is GRANTED. The mandate is stayed to and including December 10, 2009, pending the filing of a petition for writ of certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2). If such a petition is filed, Petitioners-Appellants shall notify this court in writing within the period of the stay. Fed. R. App. P. 41(d)(B). The stay shall remain in effect until the

petition for writ of certiorari is acted upon by the Supreme Court. If the writ of certiorari is granted, the stay shall continue until final disposition by the Supreme Court.

APPENDIX I

RECONSIDERATION ORDER

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF THE ARBITRATION BETWEEN,

LEONARD BOSACK; SANDY LERNER; CARTESIAN PARTNERS LP; THE LEONARD BOSACK TRUST; THE SANDY LERNER TRUST; RICHARD TROIANO; THE & TRUST; & CAPITAL PARTNERS; THE LEONARD X. BOSACK AND BETTE M. KRUGER CHARITABLE FOUNDATION, INC.; CAPITAL INC,

Petitioners - Appellants,

v.

DAVID C. SOWARD; & CAPITAL MANAGEMENT COMPANY,

Respondents - Appellees.

No. 08-35248

D.C. No. 2:07-CV-00574-TSZ Western District of Washington, Seattle

ORDER

Filed Nov. 5, 2009

IN THE MATTER OF THE ARBITRATION BETWEEN,

LEONARD BOSACK; SANDY LERNER; CARTESIAN PARTNERS LP; THE LEONARD BOSACK TRUST; THE SANDY LERNER TRUST; RICHARD TROIANO; THE & TRUST; & CAPITAL PARTNERS; THE LEONARD X. BOSACK AND BETTE M. KRUGER CHARITABLE FOUNDATION, INC.; CAPITAL INC,
Petitioners - Appellants,

v.

DAVID C. SOWARD; & CAPITAL MANAGEMENT COMPANY,
Respondents - Appellees.

No. 08-35458

D.C. No. 2:07-CV-00574-TSZ
Western District of Washington, Seattle

Before: CANBY, THOMPSON and N.R. SMITH, Circuit Judges.

The appellees' Motion, filed November 2, 2009, for Reconsideration of this court's Stay of Mandate is DENIED.

U.S.
JAN 11 2010

No. 09-682

IN THE

Supreme Court of the United States

LEONARD BOSACK, *et al.*,

Petitioners,

v.

DAVID C. SOWARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ETHAN P. SCHULMAN
Counsel of Record
MICHAEL A. KAHN
J. DANIEL SHARP
JOEL SMITH
CROWELL & MORING LLP
275 Battery Street, 23rd Floor
San Francisco, California 94111
(415) 986-2800

Attorneys for Respondents

227434

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should grant certiorari to decide whether punitive damage awards in private, voluntary arbitration should be subject to heightened judicial review for excessiveness, where the Federal Arbitration Act as authoritatively interpreted by this Court in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008) precludes such review, Petitioners did not seek such review below, and there is no conflict among the lower courts on the issue.

DISCLOSURE STATEMENT

Respondent David C. Soward is an individual. Respondent & Management Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Soward's Business Relationship With Bosack and Lerner	2
B. The Arbitration Proceedings	3
C. The District Court Proceedings	6
D. The Ninth Circuit's Decision	7
REASONS FOR DENYING THE PETITION	9
I. The Question Petitioners Present For Review Was Neither Raised Nor Resolved Below, and Is Foreclosed By This Court's Decision In *Hall Street Associates*	9

Contents

Page

A. Petitioners Successfully Urged The Lower Courts To Apply The Manifest Disregard Standard 10

B. Petitioners' Position Is Foreclosed By Controlling Authority 11

II. There Is No Conflict Among The Lower Courts Or Other Ground Warranting Certiorari 13

A. The Overwhelming Weight Of Authority Holds That Voluntary Private Arbitration Does Not Constitute State Action And Cannot Give Rise To A Due Process Claim ... 13

B. The Few Decisions Petitioners Rely Upon Do Not Give Rise To Any Conflict 17

C. Petitioners' Dire Predictions About the Wider Implications Of The Lower Court's Ruling Are Misplaced 20

III. The Court Of Appeals, In *Dicta*, Correctly Concluded That It Could Not Vacate The Arbitral Award as Excessive 22

Contents

		Page
A.	Voluntary Private Arbitration Does Not Constitute State Action	22
B.	Expanded Judicial Review Of Private Arbitration Awards Would Undermine The Efficiency And Expediency Of Arbitration As An Alternative To The Judicial System	25
CONCLUSION		27

TABLE OF CITED AUTHORITIES

Page

Cases

American Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 23

Austern v. Chicago Bd. Options Exch., Inc.,
716 F. Supp. 121 (S.D.N.Y. 1989), *aff'd*,
898 F.2d 882 (2d Cir. 1990), *cert. denied*,
498 U.S. 850 (1990) 14

B.L. Harbert Int'l, LLC v. Hercules Steel Co.,
441 F.3d 905 (11th Cir. 2006) 26

Barnes v. Logan,
122 F.3d 820 (9th Cir. 1997), *cert. denied*,
523 U.S. 1059 (1998) 16

Birmingham News Co. v. Horn,
901 So.2d 27 (Ala. 2004) 19, 20

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) 10

Black v. Cutter Laboratories,
351 U.S. 292 (1956) 11

BMW v. Gore,
517 U.S. 559 (1996) ..... *passim*

Cited Authorities

Page

Bowen v. Amoco Pipeline Co.,
254 F.3d 925 (10th Cir. 2001) 16

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 24, 25

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,
429 U.S. 257 (1989) 11

Burton v. Wilmington Parking Auth.,
365 U.S. 715 (1961) 23

California v. Rooney,
483 U.S. 307 (1987) 11

Davis v. Prudential Secs., Inc.,
59 F.3d 1186 (11th Cir. 1995) ..... *passim*

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 24

Elmore v. Chicago & Illinois Midlands Ry. Co.,
782 F.2d 94 (7th Cir. 1986) 14, 15

Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.,
822 F.2d 833 (9th Cir. 1987), *cert. denied*,
485 U.S. 987 (1988) 14

Cited Authorities

Page

Flagg Bros., Inc. v. Brooks,
436 U.S. 149 (1978) 23

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 25

Glennon v. Dean Witter Reynolds, Inc.,
83 F.3d 132 (6th Cir. 1996) 16

Hall Street Assocs., L.L.C. v. Mattel, Inc.,
552 U.S. 576, 128 S. Ct. 1396 (2008) ..... *passim*

Hereford v. D.R. Horton, Inc.,
13 So. 3d 375 (Ala. 2009) 20

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 25

Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers Local Union 42 v. Absolute Envtl. Svcs., Inc.,
814 F. Supp. 392 (D. Del. 1993) 14

In re Knepp v. Credit Acceptance Corp.,
229 B.R. 821 (Bankr. N.D. Ala. 1999) 17, 18

Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.,
341 F.3d 987 (9th Cir. 2003) 22, 26

Cited Authorities

Page

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 21-22, 24

MedValUSA Health Programs, Inc. v. Memberworks, Inc.,
872 A.2d 423 (Conn. 2005) 15, 21

Nat'l Collegiate Athletic Ass'n v. Tarkanian,
488 U.S. 179 (1988) 22-23

Porush v. Lemire,
6 F. Supp. 2d 178 (E.D.N.Y. 1998) 15

Rifkind & Sterling, Inc. v. Rifkind,
28 Cal. App. 4th 1282,
33 Cal.Rptr.2d 828 (1994) 5, 15, 26

Sanders v. Gardner,
7 F. Supp. 2d 151 (E.D.N.Y. 1998) 18

Sawtelle v. Waddell & Reed, Inc.,
304 A.D.2d 103 (N.Y. App. Div. 2003) 18, 19

Smith v. American Arbitration Ass'n, Inc.,
233 F.3d 502 (7th Cir. 2000) 15, 17, 24

State Farm v. Campbell,
123 S. Ct. 1513 (2003) ..... *passim*

Todd Shipyards Corp. v. Cunard Line, Ltd.,
943 F.2d 1056 (9th Cir. 1991) 16

Cited Authorities

Page

Tulsa Prof'l Collection Servs., Inc. v. Pope,
485 U.S. 478 (1988) 23

United Paperworks Int'l Union, AFL-CIO v. Misco, Inc.,
484 U.S. 29 (1987) 12

Volt Info. Scis., Inc. v. Bd. of Trs.,
489 U.S. 468 (1989) 21, 23, 25

Statutes

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
§ 10(a) 1, 2, 12
§ 10(a)(4) 6, 10, 19

Other Authorities

Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Preemption of State Law*, 63 FORDHAM L. REV. 529 (1994) 21

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), supplies the mechanisms for enforcing arbitration awards. Under the terms of Section 9 of the FAA, a court "must" confirm an arbitration award "unless" it is vacated, modified or corrected "as prescribed in §§ 10 and 11." 9 U.S.C. § 9. Section 10(a) lists the grounds for vacating an award as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

STATEMENT OF THE CASE

A. Soward's Business Relationship With Bosack and Lerner

In the 1990s, Petitioners Leonard Bosack and Sandy Lerner, the founders of Cisco Systems, Inc., hired Respondent David Soward to manage their considerable personal wealth. Pet. App. at 5a, 48a. Several years into Soward's tenure, Soward and Bosack formed Cartesian Partners L.P. ("Cartesian"). *Id.* at 5a. Soward was the general partner and invested his own money; Bosack was a limited partner. *Id.* at 5a, 101a-102a. As of 2003, Soward's capital interest in Cartesian was $1,001,101. *Id.* at 102a.

In 2002, Soward asked Bosack and Lerner to extend his contract and increase his compensation for his services as their investment manager. *Id.* at 104a. Bosack and Lerner responded by firing Soward. *Id.* Bosack purported to terminate Soward as general partner of Cartesian, despite having no signed agreement permitting him to do so. *Id.* at 5a, 107a. Contending that Soward had no "lawful interest" in Cartesian, Bosack and Lerner jointly formed a new entity called SLLB, LLC ("SLLB") to replace Soward as the general partner.

Id. at 103a, 108a. Without telling Soward, they filed a false tax return reducing Soward's capital account from $1,001,101 to $135,889, "or in the alternative to zero." *Id.* at 106a, 121a. SLLB took over the assets of Cartesian, and Bosack and Lerner refused to provide Soward with an accounting of his interest until they were ordered to do so by the arbitrators in 2006. *Id.* at 106a, 120a-25a.

B. The Arbitration Proceedings

The parties voluntarily submitted to arbitration all of the claims and counterclaims between them. *Id.* at 51a. Each side sought, among other relief, punitive damages from the other. *Id.* at 68a-69a. The arbitration proceedings lasted two years, during which time the panel of arbitrators held more than sixty days of hearings, heard the testimony of four experts and approximately twenty-six witnesses, and received over five hundred exhibits into evidence. *Id.* at 52a. The arbitrators were among the most experienced and respected panelists in California, and gave careful consideration to all of the parties' evidence and contentions, issuing 52 written hearing orders, five Interim Awards, and one Final Award. *See id.* at 51a-52a.

Soward prevailed on all claims that he brought. As to Cartesian, the arbitrators found that Bosack and Lerner intentionally sought to hurt Soward by engaging in "a planned, malicious, [and] purposeful attempt to take Soward's interest in Cartesian away from him and convert[ing] it for Bosack's use." *Id.* at 58a-59a. In Interim Award No. 3, the arbitrators found that Soward was entitled to an accounting of his interest in Cartesian

as of September 30, 2006, valued at $1,464,391. *Id.* at 6a, 54a. In Interim Award No. 4, the arbitrators found Bosack liable in tort for breach of fiduciary duty, and both Bosack and Lerner liable for unjustifiable conversion of Soward's interest in Cartesian. *Id.* at 6a-7a. They awarded $1,001,101 plus prejudgment interest on both tort claims, with this amount "deemed satisfied" by payment of the accounting award. *Id.* at 122a-23a.

Based on "clear and convincing" evidence of Petitioners' malice, the arbitrators made two separate punitive damage awards against Bosack and Lerner in Interim Award No. 5. *Id.* at 91a-92a. The arbitrators awarded punitive damages of $10,999,494 against Bosack, using a 9:1 multiplier measured against compensatory damages of $1,222,166 (principal and interest) on the tort claims. *Id.* at 92a, 96a. They awarded $8,555,162 in punitive damages against Lerner using a multiplier of 7:1. *Id.* at 92a, 96a.

To set the amount of punitive damages, the arbitrators engaged in a two-part analysis. First, they applied California law to "determine an amount that will have the proper deterrent effect and ensure that malicious and oppressive conduct is not repeated," in light of each defendant's high net worth. *Id.* at 92a. Second, after applying state law standards, the arbitrators emphasized that,

> [O]ne must determine whether or not the amount proposed is consistent with the Due Process standard of the 14th Amendment, as established by the U.S. Supreme Court in *BMW v. Gore* (1996) 517 U.S. 559 and

> *State Farm v. Campbell* (2003) 123 S.Ct. 1513. Significantly, in *Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal. App. 4th 1282, 1290-1293, 33 Cal.Rptr.2d 828, the court held that because of the lack of state action, a private contractual arbitration is not subject to the strictures of the due process clause. Notwithstanding *Rifkind*, the Panel has endeavored to follow the due process guidelines set forth in *BMW v. Gore* and successor cases.

Id. at 92a-93a.

The arbitrators devoted an entire section of Interim Award No. 5 to the application of *BMW* and *State Farm* to the facts of the case, examining the reprehensibility of Petitioners' conduct, the appropriate ratio between the compensatory and punitive damage awards, and the civil penalties authorized for similar misconduct. *Id.* at 94a-97a. With respect to the first issue, the arbitrators concluded, "[m]easuring the actions of Respondents against the five-point scale of *State Farm*, we find the actions of Bosack and Lerner [h]ighly reprehensible." *Id.* at 95a. The arbitrators concluded that, on the facts of the case, a relatively high punitive damages ratio was necessary to provide a meaningful deterrent. *Id.* at 96a-97a. Finally, the arbitrators relied on California authority to ensure that, consistent with *State Farm*, the punitive damages awards were in line with civil penalties authorized or imposed for comparable misconduct. *Id.* at 97a.

C. The District Court Proceedings

Bosack and Lerner filed separate petitions in the district court in Seattle seeking to vacate the punitive damage awards pursuant to Section 10(a)(4) of the Federal Arbitration Act. *Id.* at 47a, 61a. Both argued that in setting the punitive damages, the arbitrators "manifestly disregarded" this Court's rulings in *State Farm* and *BMW* by awarding punitive damage awards that (when added together) were sixteen times the compensatory damages award. *Id.* at 60a.[1] Neither Bosack nor Lerner contended that due process required the district court to perform a general review of the arbitration panel's award of punitive damages.

The district court held that due to the limited scope of review permitted under the FAA, it could not vacate the award for purported errors of law or fact. Pet. App. at 61a-62a. The court also stated that it "cannot vacate the awards based on their excessiveness." *Id.* at 69a. However, the district court did not hold that it was barred from engaging in *any* review of the punitive damage awards whatever. Instead, the court explained that under the "manifest disregard" theory, vacatur would be warranted if Petitioners could show that "the arbitrators recognized the applicable law and then ignored it." *Id.* at 62a. Because the record showed that the arbitration panel had expressly applied *BMW* to the

---

1. Bosack and Lerner have since revised their math, and now contend that the ratio of punitive damages to compensatory damages was twenty to one. Pet. at 2, 7.

facts of the case, the court upheld the awards in full. *Id.* at 59a, 69a.

D. The Ninth Circuit's Decision

On appeal, Petitioners again argued that the awards should be vacated because the arbitrators had manifestly disregarded the law. Petitioners conceded that "while a punitive damages award in arbitration *may not be subject to heightened review for excessiveness*, it must be subject to the judicial review ordinarily applied to arbitration awards." Lerner's Opening Br. On Appeal, Appeal Nos. 08-35248 and 08-35458 (Oct. 28, 2008) ("Appellate Brief"), at 60-61 (emphasis added).

The Ninth Circuit affirmed the district court's decision. In applying the "manifest disregard" standard urged by Petitioners, the Ninth Circuit explained that an arbitrator does not "exceed its powers" under the FAA by making an error of law or fact, but instead does so only where it is "clear from the record that the arbitrator [] recognized the applicable law and then ignored it." Pet. App. at 11a (citations omitted). The Ninth Circuit found no basis in the record to conclude that standard met here, emphasizing that "the panel extensively discussed and then applied both *State Farm* and *BMW*" and that "Bosack and Lerner have failed to show that the panel demonstrated a manifest disregard of the law in issuing the award." *Id.* at 14a.

The Ninth Circuit stated in *dicta* that it agreed with the district court's holding that it could not vacate the arbitration awards at issue for excessiveness. *Id.* at 14a. However, it did not analyze whether a right of due process under the federal constitution as found in *State Farm* and *BMW* requires a court to engage in *de novo* or heightened review of private arbitration awards. Nor did it address whether judicial confirmation of arbitral awards constitutes state action. Moreover, while Petitioners argued for the first time on appeal that judicial confirmation of arbitral awards furnishes the necessary state action to trigger due process concerns, those arguments were offered in support of limited review for manifest disregard of the law, not enhanced *State Farm* review, which Petitioners conceded did not apply. Appellate Br. at 59-61. Rather, Petitioners argued that due process concerns compel district courts to subject punitive arbitral awards "to the *same* review as other aspects of arbitration awards, and therefore, where arbitrators award punitive damages in manifest disregard of the law, those damages must be vacated." *Id.* at 57 (emphasis added).

REASONS FOR DENYING THE PETITION

I.

THE QUESTION PETITIONERS PRESENT FOR REVIEW WAS NEITHER RAISED NOR RESOLVED BELOW, AND IS FORECLOSED BY THIS COURT'S DECISION IN *HALL STREET ASSOCIATES*.

Petitioners ask this Court to decide "[w]hether an arbitral award of punitive damages is subject to constitutional constraints on excessiveness," contending that certiorari is warranted because the Ninth Circuit "refused to review the award to determine whether it was excessive under this Court's due process precedents." Pet. at 1. Even more broadly, Petitioners argue for the first time in this Court that the manifest disregard standard they urged the lower courts to apply "does not satisfy the constitutional standard of "meaningful" and "adequate" review of an award of punitive damages." *Id.* at 16. The Court should deny certiorari because Petitioners never raised those issues in the lower courts, which therefore did not reach them. Even more fundamentally, Petitioners' attack on the manifest disregard standard is squarely foreclosed by this Court's recent holding in *Hall Street Associates*, which narrowly limits judicial review of arbitration awards under the Federal Arbitration Act.

A. Petitioners Successfully Urged The Lower Courts To Apply The Manifest Disregard Standard.

In the lower courts, Petitioners consistently challenged the award on the ground that in awarding punitive damages, the arbitrators had "manifestly disregarded" the law. Petitioners now reverse course, asserting that due process requires a broader, *State Farm*-like review of arbitral awards of punitive damages. Indeed, they argue for the first time in this Court that the manifest disregard standard they urged the Ninth Circuit to apply below itself violates due process. However, having failed to raise these contentions below, Petitioners are barred from raising them in this Court for the first time. *E.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)(a question is not properly before the Court where it was not raised or resolved in the court of appeals).

Petitioners urged the lower courts to vacate the arbitration award on the ground that the arbitrators "manifestly disregarded" the law. Indeed, they admitted below that a punitive damages award in arbitration "may not be subject to heightened review for excessiveness," and that they were only seeking the judicial review "ordinarily applied to arbitration awards." Appellate Br. at 60-61. That "ordinary" standard referred to the narrowly limited review available under Section 10(a)(4) of the FAA, under which a court may vacate an arbitration award only if the arbitrators "exceeded their powers" by "manifestly disregarding the law." While Petitioners raised due process arguments below, those arguments were insufficient to preserve the constitutional issue now framed by Petitioners because they were offered only in support of

limited review under the FAA, not—as Petitioners now suggest—enhanced, *State Farm* review under the Due Process Clause of the Fifth Amendment. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 429 U.S. 257, 277 (1989)(holding that due process challenge to punitive damage award must be directly raised below for purposes of preserving for certiorari).

Understandably in light of Petitioners' position below, the Ninth Circuit did not reach or resolve the issue they now seek to raise. That court reviewed the awards for manifest disregard of the law without analyzing any constitutional due process issues, including the threshold question of whether voluntary private arbitration involves state action. Pet. App. at 33a. Thus, its passing agreement with the district court that it could not vacate the award for excessiveness was, at best, *dicta*, which is not a proper subject of review. *California v. Rooney*, 483 U.S. 307, 311 (1987)("This Court reviews judgments, not statements in opinions") (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

B. Petitioners' Position Is Foreclosed By Controlling Authority.

Petitioners do not make any effort to reconcile their contention that arbitration awards should be subject to a heightened, *State Farm* judicial review for excessiveness with this Court's ruling in *Hall Street Associates*. Instead, the petition simply makes no reference at all either to the FAA or to *Hall Street Associates*.

Petitioners' position is flatly foreclosed by this Court's recent, authoritative decision in *Hall Street Associates*. There, the Court squarely held that Section

10(a) of the FAA sets forth the "exclusive" grounds for vacatur of an arbitration award. 128 S. Ct. at 1403; *accord id.* at 1400 ("We hold that the statutory grounds are exclusive").[2] Those exclusive grounds do not include an inquiry into whether an award is "excessive." The Court reaffirmed the continued vitality of the "manifest disregard of the law" standard, strongly suggesting that standard is coextensive with the statutory grounds for vacatur found in Section 10. *Id.* at 1404. And it reaffirmed the long-standing prohibition against courts conducting a "general review for an arbitrator's legal errors." *Id.* at 1404; *see also, e.g., United Paperworks Intl Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)("[T]hat a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision").

Petitioners' argument in favor of full-blown *State Farm* review of arbitral awards amounts to an unspoken constitutional challenge to the constitutionality of the FAA as applied to arbitrators' awards of punitive damages. Petitioners' position cannot be reconciled with this Court's recent holding in *Hall Street Associates*. The petition should be denied on that ground alone.

---

2. The Court rejected the argument that review of arbitration awards for "manifest disregard of the law" confers expanded authority on courts to review arbitration awards. 128 S. Ct. at 1404.

II.

THERE IS NO CONFLICT AMONG THE LOWER COURTS OR OTHER GROUND WARRANTING CERTIORARI.

Petitioners assert that certiorari is appropriate because the lower courts are in "disarray" over "the important question" of whether "arbitral awards of punitive damages are subject to the constitutional constraints of due process." Pet. at 8, 11. In fact, there is no such conflict among lower courts on this issue. The great weight of authority, including every federal circuit to have addressed the issue, holds that voluntary private arbitration proceedings do not involve state action and cannot give rise to due process claims. Petitioners do not cite a single case that endorsed a heightened, *State Farm*-like review of arbitral awards for excessiveness. Likewise, Petitioners do not cite a single case—and, to our knowledge, there is none—in which a court overturned an arbitral award of punitive damages on the ground that it was unconstitutionally excessive.

A. The Overwhelming Weight Of Authority Holds That Voluntary Private Arbitration Does Not Constitute State Action And Cannot Give Rise To A Due Process Claim.

The great weight of authority rejects the notion that a litigant disappointed with the outcome of a private, voluntary arbitration proceeding can challenge the arbitration award on due process grounds. Thus, virtually every court to have squarely addressed the

issue, including every federal circuit to have done so, has concluded that voluntary private arbitration does not constitute state action sufficient to trigger due process review. *E.g.*, *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995)("We agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases"); *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 843 n.9 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988) ("Although Congress . . . has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim"); *Elmore v. Chicago & Illinois Midlands Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986)("[T]he fact that a private arbitrator denies the procedural safeguards . . . cannot give rise to a constitutional complaint"); *Austern v. Chicago Bd. Options Exch., Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989), *affd*, 898 F.2d 882 (2d Cir. 1990), *cert. denied*, 498 U.S. 850 (1990) (holding that arbitration panel's conduct "did not in any way constitute state action"); *Intl Ass'n of Heat & Frost Insulators and Asbestos Workers Local Union 42 v. Absolute Envtl. Svcs., Inc.*, 814 F. Supp. 392, 402-03 (D. Del.1993)(no state action in arbitration proceedings pursuant to collective bargaining agreement between private parties).

The rationale for this broad consensus that contractual arbitration does not constitute state action is straightforward:

> Private arbitration, however, really is private; and since constitutional rights are in

> general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint.

Elmore, 782 F.2d at 96; *accord*, *Davis*, 59 F.3d at 1191 (arbitration is "a private proceeding arranged by a voluntary contractual agreement of the parties.") *Porush v. Lemire*, 6 F. Supp. 2d 178, 186 (E.D.N.Y. 1998)("Simply put, private arbitrators are not state actors and, absent state action, there can be no violation of either amendment"); *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal.App. 4th 1282, 1292, 33 Cal.Rptr.2d 828, 834 (1994)("the legal and practical reality" is that "an arbitration award is not a product of public law or state proceedings, but rather is a private arrangement, governed by rules of the parties' own making or selection").

There is also widespread agreement that "mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause." *Davis*, 59 F.3d at 1192; *see also, e.g.*, *Smith v. American Arbitration Ass'n, Inc.*, 233 F.3d 502, 507 (7th Cir. 2000)(judicial enforcement of arbitration contracts "does not convert the contracts into state or federal action and so bring the equal protection clause into play") (citations omitted); *MedValUSA Health Programs, Inc. v. Memberworks, Inc.*, 872 A.2d 423, 434-35 (Conn. 2005)("Almost universally, courts have concluded that

judicial confirmation of an arbitration award is not sufficient to convert the action of an arbitrator into state action") (collecting authorities).

Other courts, without reaching the state action issue, have rejected due process challenges to arbitration awards (including arbitral awards of punitive damages) on the ground that parties that voluntarily enter into arbitration agreements may not later assert that the limited judicial review of arbitration awards afforded by the Federal Arbitration Act violates due process:

> Cunard had every opportunity to present evidence, to argue the merits of its position, and to challenge the arbitrator's award in court. Having taken advantage of this process, into which it entered voluntarily, Cunard cannot now argue that its due process was denied.

Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063-64 (9th Cir. 1991); *see also, e.g.*, *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001)("[Appellant] may not now oppose the very process it advocated and to which it voluntarily submitted"); *Barnes v. Logan*, 122 F.3d 820, 824 (9th Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998) (rejecting contention that award of punitive damages by arbitrators should be subject to "heightened scrutiny"); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 138-39 (6th Cir. 1996)(FAA affords "meaningful review" of claims that no evidence supports an arbitration panel's award of punitive damages arbitration awards, and therefore does

not violate due process); *Smith*, 233 F.3d at 506-07("By agreeing to arbitrate in a setting in which [the opposing party] if it prevailed could seek confirmation under the Federal Arbitration Act, [appellant] bound herself to accept the limited judicial review which that act allows").

B. The Few Decisions Petitioners Rely Upon Do Not Give Rise To Any Conflict.

Petitioners erroneously assert that certiorari is warranted because there is a conflict on the question whether arbitral awards of punitive damages are subject to due process review for excessiveness. Pet. at 8-12. In fact, Petitioners do not cite a single case holding that the limited judicial review permitted by the FAA must give way to the heightened, *State Farm* review for excessiveness of arbitral awards that Petitioners now seek. In particular, there is not "a single case holding that an award of punitive damages by an arbitrator is in any way unconstitutional." *Davis*, 59 F.3d at 1192.

The handful of lower court decisions on which Petitioners rely do not give rise to any conflict, much less a well-developed conflict, warranting review by this Court. One bankruptcy court expressed the view that judicial enforcement of arbitration agreements could be considered state action, but that court ultimately acknowledged it was bound by the Eleventh Circuit's opinion in *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186 (11th Cir. 1995), and that the arbitration clause was *not* subject to scrutiny under the Due Process Clause. *In re Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 841 (Bankr. N.D. Ala. 1999). Further, that discussion was pure *dicta*, as the court had already concluded that there

was no enforceable arbitration agreement because neither party had signed the arbitration clause. *Id.* at 834, 836-37. Finally, the case did not involve a challenge to an award of punitive damages, but instead a party's opposition to a motion to compel arbitration on the ground that the arbitration clause's limitation on his ability to conduct discovery would violate due process. *Id.* at 840.

Likewise, the district court in *Sanders v. Gardner*, 7 F. Supp. 2d 151 (E.D.N.Y. 1998), followed *Davis* in holding that imposition of punitive damages in arbitration did *not* violate due process. *Id.* at 173-74 ("The assertion that the arbitrators' imposition of punitive damages is violative of due process because there is no protection against arbitrary results, is also unsupported by precedent"). While the court appeared to assume, without deciding, that arbitral awards of punitive damages could be constitutionally excessive (*id.* at 176-79), it also acknowledged that the award could be vacated only if the arbitrators had "manifestly disregarded the law" in reaching their decision. *Id.* at 158-59. And the court upheld an award of $10 million in punitive damages and $184,583 in compensatory damages—a ratio of more than 54 to 1—based on a finding that "the Arbitrator's punitive damages award cannot be said to be a manifest disregard of the law." *Id.* at 170, 177-79.

In *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103 (N.Y. App. Div. 2003), an intermediate state appellate court, citing *Davis*, observed that "there is ample authority for the proposition that private arbitration does not implicate due process concerns since, where

the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation of the punitive damage award." *Id.* at 109-10. The court did not decide the due process issue, which it characterized as "besides the point"; instead, it referred to *BMW* solely as a guideline to determine whether the award should be vacated as "arbitrary and irrational." *Id.*; *see also id.* at 110 (*Gore* test "has application outside the realm of a due process claim in a review of a punitive damage award"). Moreover, that was only an alternative ground, as the court also found that the manifest disregard standard was satisfied. *See id.* at 113-14 ("in awarding $25 million in punitive damages, the panel completely ignored applicable law, an error that provides a separate basis for vacating the award"). In any event, *Sawtelle* is of doubtful validity, because that an award is "arbitrary and irrational" is not among the exclusive statutory grounds for vacatur. *See Hall Street*, 128 S. Ct. at 1400.

Finally, in *Birmingham News Co. v. Horn*, 901 So.2d 27 (Ala.2004), the Alabama Supreme Court suggested that there was sufficient state action inherent in court orders compelling arbitration to justify review of the awards under federal due process considerations. *Id.* at 66. However, the court grounded its ruling affirming the punitive damages award in that case squarely on the "manifest disregard" standard. *See id.* at 66-69. It upheld the award of punitive damages under that standard, explaining that "the panel presented an extensive explanation of the numerous factors and criteria it considered in arriving at its assessment of punitive damages . . . and it certainly cannot be said that it completely ignored or disregarded the legal

principles laid down in [*BMW*] and [*State Farm*]." *Id.* at 69.[3] Thus, at most *Birmingham News* stands for the proposition that arbitrators should consider *State Farm*'s due process factors, but that courts may not vacate the resulting award unless the arbitrators manifestly disregarded the law. That holding is entirely consistent with the Ninth Circuit's decision here.

C. Petitioners' Dire Predictions About the Wider Implications Of The Lower Courts Ruling Are Misplaced.

Petitioners predict that the limited judicial review of arbitral awards afforded by the FAA will create "a powerful disincentive to arbitration," leading to greater burdens on the courts, and will expose parties "to an arbitrator's virtually unchecked power to impose punishment for nothing more than ordinary commercial conduct." Pet. at 12, 13. However, Petitioners offer no evidence that any such adverse effects have occurred or will occur in the future, much less that full-blown, *State Farm* review of arbitral punitive damages awards is essential to avoid such adverse effects.

This Court rejected an identical argument in *Hall Street Associates*, where the petitioner argued that "parties will flee from arbitration if expanded review is not open to them." 128 S. Ct. at 1406. The Court found no evidence to support that prediction, and observed that even if accurate, it could provide no justification

---

3. Following *Hall Street Assocs.*, that court later overruled *Birmingham News Co.* in part. *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 380-81 (Ala. 2009).

for rewriting the statute. *Id.* ; *see also MedValUSA Health Programs, Inc.*, 872 A.2d at 438 n.14 (dismissing as "wholly speculative" contention "that parties engaged in negotiation over contract language will decide not to include an arbitration clause *at all*, because of the possibility that, in the event of a breach, the arbitration panel will render an excessive punitive damages award that a court will not be able to overturn . . . .").

Contrary to Petitioners' dire predictions, "[t]he expertise of arbitrators and the lack of bias in the arbitral forum have caused some commentators to predict that runaway punitive damage verdicts are a problem that is likely to be reduced, rather than aggravated, by shifting disputes from courts to arbitration." *Davis*, 59 F.3d at 1192 (quoting Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Preemption of State Law*, 63 FORDHAM L. REV. 529, 570 (1994)); *see also, e.g., MedValUSAHealth Programs, Inc.*, 872 A.2d at 438 n.14 ("Simply because we can *conceive* of an arbitration award of the magnitude hypothesized by the dissent, does not mean that such an award is likely to occur. We ought not to make rules of law based on unrealistic hypotheses").

Finally, Petitioners' argument simply ignores the practical realities of voluntary arbitration. As this Court has recognized, "parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). Parties wishing to avoid punitive damages in arbitration may do so by expressly excluding such damages in the arbitration agreement. *See Mastrobuono v. Shearson*

Lehman Hutton, Inc., 514 U.S. 52, 58 (1995)(explaining that the availability of punitive damages in arbitration turns on the language of the arbitration contract). Alternatively, "[s]hould parties desire more scrutiny than the [FAA] authorizes courts to apply, they can contract for an appellate arbitration panel to review the arbitrator's award." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 993 (9th Cir. 2003) (citation and internal quotation omitted). What they may not do is what Petitioners did here: agree to submit their dispute to arbitration, empower the arbitrators to award exemplary damages and seek such an award of damages from the other party, and then challenge an adverse award on the ground that it deprives them of due process.

III.

THE COURT OF APPEALS, IN *DICTA*, CORRECTLY CONCLUDED THAT IT COULD NOT VACATE THE ARBITRAL AWARD AS EXCESSIVE.

While the Ninth Circuit's observation that it could not vacate the punitive damage awards for excessiveness was mere *dicta*, and therefore not a proper subject of review, this Court also should deny certiorari because that conclusion was correct.

A. Voluntary Private Arbitration Does Not Constitute State Action.

Constitutional due process protections "do not extend to private conduct abridging individual rights," but only to state action. *Nat'l Collegiate Athletic Assn*

v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). The state action concept is narrow, and applies only where the state exercises such "coercive power" or "significant encouragement" that the conduct at issue may be "fairly treated as that of the State itself." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). This Court repeatedly has held that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." *Id.* at 53 (state-sanctioned private review of workers compensation disputes is not state action) (quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988)); *see also, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978)(post-eviction sale of property permitted under state law did not constitute state action).

The necessary element of coercive state action is not satisfied in private, voluntary arbitration for the simple reason that "arbitration under the [FAA] is a matter of consent, not coercion." *Volt Info. Scis., Inc.*, 489 U.S. at 479. No state action is necessary to enable the existence of an arbitration agreement, which is operative when signed by the parties. Nor is coercive state action necessary for an arbitrator to issue a punitive damages award pursuant to that agreement. That a court may later confirm (or decline to vacate) an award pursuant to that agreement is no different from judicial enforcement of any other contract, and falls far short of the "significant encouragement" required for state action. *See American Mfrs. Mut. Ins. Co.*, 526 U.S. at 53 ("We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests,

so significantly encourages the private activity as to make the State responsible for it"); *Smith*, 233 F.3d at 507 ("[t]he fact that the courts enforce [arbitral awards], just as they enforce other contracts, does not convert the contracts into state or federal action"); *Davis*, 59 F.3d at 1191-92 (holding limited judicial involvement in confirmation of arbitral awards insufficient to bring conduct within ambit of Due Process Clause).

Petitioners briefly argue that private arbitration constitutes state action because arbitrators perform a "public function," and because judicial enforcement of an arbitration award constitutes "significant overt assistance" on the part of the government. Pet. at 14-15. However, neither argument is supported by this Court's precedents. *First*, arbitrators do not perform a public function at all. They are appointed by private disputants, not the state; and they award relief, including punitive damages, pursuant to the parties' contract, not in order to further the public policies applicable in civil court proceedings. *See Mastrobuono*, 514 U.S. at 58. For that reason, this case is the polar opposite of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), which found state action in judicial enforcement of discriminatory peremptory challenges in jury selection on the ground that the "trial judge exercises substantial control over *voir dire* in the federal system." *Edmonson*, 500 U.S. at 623.

Second, the government "assistance" involved in the mere judicial enforcement of an arbitration award is a far cry from that involved in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288 (2001), which held that an athletic association was a state actor

in light of the "*pervasive* entwinement of public institutions and public officials in [the association's] composition and workings." *Id.* at 298 (emphasis added). Courts do not exercise similar "substantial" or "pervasive" control over the arbitral process, which is dictated by the disputants. *See Volt Info. Scis.*, 489 U.S. at 479.[4] Indeed, Petitioners' state action theory sweeps far too broadly, as it would necessarily mean that *all* judicial enforcement of private contracts constitutes state action, thereby erasing any distinction between public and private law.

B. Expanded Judicial Review Of Private Arbitration Awards Would Undermine The Efficiency And Expediency Of Arbitration As An Alternative To The Judicial System.

Petitioners' call for heightened review of arbitral awards is not only inconsistent with the FAA and this Court's precedents, it would also undermine the very purpose of arbitration. As this Court has explained, opening the door to expanded judicial review would thwart arbitration's "essential virtue of resolving

---

4. Neither *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) nor *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) supports Petitioners' argument. *Gilmer* (which involved neither punitive damages nor a due process claim) held that the limited judicial review permitted under the FAA was *sufficient* to protect the parties' rights. 500 U.S. at 32 n.4. *Honda Motor* involved an award of punitive damages by a *jury*, not by a panel of arbitrators in voluntary arbitration. In any event, the "fair notice" issue it involved is not germane to arbitration, where the parties are free to limit the penalties in advance in their arbitral agreement.

disputes straightaway" by rendering arbitration "merely a prelude to a more cumbersome and time-consuming judicial review process." *Hall Street Assocs.*, 128 S. Ct. at 1405 (quoting *Kyocera*, 341 F.3d at 998); *see also Rifkind & Sterling, Inc.*, 28 Cal.App. 4th at 1292, 33 Cal.Rptr.2d at 834 ("If the limited state involvement of converting the award into a judgment were to engender the same due process incidents required with respect to an award originally assessed and imposed by a court, the contrasting simplicity, informality, and private nature of arbitration would be seriously undermined").

This case is an unfortunate example of what one circuit has described as arbitration's perennial "poor loser problem," wherein the losing party drags the dispute through the courts in a vain attempt to obtain a better result in the courts, with the result that resolution costs more than it would have had there been no arbitration in the first place. *See B.L. Harbert Intl, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006). Petitioners' call for an exception to the limited review provided for under the FAA, if heeded, would only exacerbate the "poor loser" problem and force courts to develop an entirely new body of law governing punitive damage awards in arbitration. Petitioners' attempt to expand judicial review of arbitration awards is misguided, contrary to the law, unworkable and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ETHAN P. SCHULMAN
Counsel of Record
MICHAEL A. KAHN
J. DANIEL SHARP
JOEL SMITH
CROWELL & MORING LLP
275 Battery Street, 23rd Floor
San Francisco, California 94111
(415) 986-2800

Attorneys for Respondents

Supreme Court, U.S.
FILED
FEB 2 - 2010
OFFICE OF THE CLERK

No. 09-682

IN THE

Supreme Court of the United States

LEONARD BOSACK, *ET AL.*,
Petitioners,

v.

DAVID C. SOWARD, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

DANIEL H. BROMBERG
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
5th Floor
Redwood Shores, CA 94065

FRED G. BENNETT
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

STEVEN L. SMITH
ROBIN E. DEVAUX
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR PETITIONERS 1
CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Arthur Anderson LLP v. Carlisle,
129 S. Ct. 1896 (2009) 6

Birmingham News Co. v. Horn,
901 So. 2d 27 (Ala. 2004) 3, 4

Bowen v. Amoco Pipeline Co.,
254 F.3d 925 (10th Cir. 2001) 8

Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288
(2001) 9, 10

Citizens United v. Fed. Election Comm'n, No. 08-205, 2010 WL
183856 (Jan. 21, 2010) 2

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 9

Demore v. Kim,
538 U.S. 510 (2003) 7

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 10

Exxon Shipping Co. v. Baker,
128 S. Ct. 2605 (2008) 4, 8

Hall Street Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) 6

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 3

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 2

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 6

TABLE OF AUTHORITIES
(Continued)

Page(s)

Philip Morris USA v. Williams, 549 U.S. 346 (2007) 8

Sanders v. Gardner, 7 F. Supp. 2d 151 (E.D.N.Y. 1998) 5

Sawtelle v. Waddell & Reed, Inc., 304 A.D.2d 103 (N.Y. App. Div. 2003) 5

State Farm Mut. Auto Ins. Co. v. Campbell, 512 U.S. 415 (1994) 4

Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991) 2, 8

Vaden v. Discover Bank, 129 S. Ct. 1262 (2009) 6

STATUTES AND RULES

9 U.S.C. § 10(a) 7, 8

9 U.S.C. §§ 1-16 9

Cal. Code Civ. Proc. §§ 1280-1292.2 9

REPLY BRIEF FOR PETITIONERS

The petition demonstrated that the $20 million in punitive damages awarded in this case—a 20-1 ratio of punitive damages to compensatory damages—was plainly unconstitutional, and that the Ninth Circuit's approach gives arbitrators unbridled power to impose unconstitutionally excessive punitive damages. Pet. 3, 12-13. Indeed, the petition observed that under the Ninth Circuit's decision, the arbitrators could have imposed a $40 million or even a $100 million award. Pet. 3. Respondents do not dispute these points. Notably absent from the opposition is any attempt to reconcile the arbitrators' award with the constitutional limits on punitive damages awards. Nor is there any attempt to explain how the Ninth Circuit could have avoided confirming a $100 million (or, for that matter, a $1 billion) punitive damages award. Instead, Respondents argue that the Ninth Circuit correctly held that due process imposes no restriction at all on the size of punitive damages awards in arbitration.

That holding conflicts with the decisions of other jurisdictions, which have held that such awards must be subject to meaningful review. Moreover, it raises a recurring issue of evident importance, especially in the vast confines of the Ninth Circuit where arbitrations must now be conducted without any meaningful review of punitive damages awards. This Court's review is warranted.

1. Respondents first argue that review is unwarranted because the question petitioners present was not presented to the court of appeals. Br. in Opp. 10. Respondents are incorrect.

The question presented by petitioners is "[w]hether an arbitral award of punitive damages is subject to constitutional constraints on excessiveness." Pet. i. Petitioners clearly presented that issue to the court of appeals. As the court of appeals recognized, petitioners "challenge[d] the constitutionality of the punitive damages award" on the ground that it far "exceed[ed the] 1:1 ratio" required by this Court's decisions. Pet. App. 14a.

In any event, petitioners are free to raise in this Court any issue "passed upon" by the court below, regardless of whether they previously raised it. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see Citizens United v. Fed. Election Comm'n*, No. 08-205, 2010 WL 183856, at *9 (Jan. 21, 2010) (noting that petitioner "raise[d] this issue for the first time before us, but we consider the issue because 'it was addressed by the court below'") (quoting *Lebron*, 513 U.S. at 379). The courts below directly "passed upon" the question presented here. The district court held that, "[b]ecause due process does not apply to arbitration awards, the Court cannot vacate the awards based on their excessiveness." Pet. App. 69a (citing *Barnes v. Logan*, 122 F.3d 820, 824 (9th Cir. 1997); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943, F.2d 1056, 1063-64 (9th Cir. 1991)). The court of appeals expressly "agree[d]" with the district court that due process does not apply to arbitral awards, and that it therefore "could not vacate the arbitration award for excessiveness." Pet. App. 14a. Consequently, the question whether an arbitral award of punitive damages is subject to constitutional constraints on excessiveness is properly presented here.

2. This Court's review of the question presented is warranted because the decision below squarely conflicts with decisions from other jurisdictions.

In *Birmingham News Co. v. Horn*, 901 So. 2d 27 (Ala. 2004), *overruled on other grounds, Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 379 (Ala. 2009), the Alabama Supreme Court "readily perceive[d] the requisite state action underlying" the district court's confirmation of the arbitrator's award in that case, and concluded that the state action was "sufficient to justify [its] review of the award[] under governing federal due-process considerations." *Id.* at 66. Consistent with that holding, the Alabama Supreme Court undertook review of the arbitrator's award to ensure that it was not constitutionally excessive. *Id.* at 66-69.

Petitioners argue that there is no conflict between the decision below and *Birmingham News* because the Alabama Supreme Court engaged in constitutional review under the manifest disregard standard, while the court below also invoked the manifest disregard standard, albeit after holding that no constitutional review was required. Br. in Opp. 19-20.

Respondents' effort to blur the fundamental distinction between the two decisions is unavailing. The Constitution requires "meaningful and adequate [judicial] review" of an award of punitive damages. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). That requirement can be satisfied through a number of different review standards, including "meaningful and adequate" manifest-disregard review. It cannot be satisfied, however, by manifest-disregard review

that is neither meaningful nor adequate. Because the Alabama Supreme Court held that the Constitution requires review of an arbitrator's punitive damages award for excessiveness, it proceeded to engage in manifest-disregard review that was both meaningful and adequate. 901 So. 2d at 66-69. In particular, it carefully examined whether the arbitrator's ratio of punitive damages to compensatory damages was consistent with this Court's precedents. *Id.* at 68-69 (indicating that a 26 to 1 ratio would be inappropriate, but the arbitrator's ratio of 2.5 to 1 was permissible).

In contrast, the court below examined only whether the arbitration panel identified and purported to apply the Court's excessiveness precedents. It did not examine, as the Alabama Supreme Court did, whether the award so far deviated from the ratio required by this Court's precedents as to constitute a manifest disregard of them. Pet. App. 14a.

This case dramatically illustrates the difference between the two approaches. In this commercial dispute involving solely economic injury and a compensatory damages award exceeding $1 million, this Court's decisions limit punitive damages to a 1-1 ratio. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 512 U.S. 415, 425 (1994); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626-28 (2008). The arbitration panel nonetheless awarded punitive damages at a ratio of 20-1. Based on its view that no constitutional review was required, the court of appeals upheld enforcement of the award because the arbitration panel identified and purported to apply the Court's precedents. But under the standard of meaningful and adequate review required by the

Constitution and applied by the Alabama Supreme Court, the award must be vacated because it manifestly disregards the ratio called for by this Court's decisions.

Nor does this case set the upper boundary on the amount of an award that an arbitration panel could impose. Under the standard adopted by the court of appeals, the arbitration panel could have imposed a $50 million, $100 million, or even a $500 million award, and the district court would have been required to enforce it. The standard applied by the Alabama Supreme Court, by contrast, would require the invalidation of such grossly excessive awards.

In addition, as the petition explains (at 8-11), the decision below conflicts with other decisions that have addressed the question whether, and to what extent, punitive damages awards in arbitration are subject to judicial review for excessiveness. *See, e.g.*, *Sanders v. Gardner*, 7 F. Supp. 2d 151, 176-79 (E.D.N.Y. 1998) (court should afford meaningful and adequate review of arbitration award to determine whether the ratio is excessive in light of this Court's precedents); *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 109-11, 117-18 (N.Y. App. Div. 2003) (arbitration award must be reviewed for excessiveness under this Court's due process precedents), *appeal after remand*, 21 A.D.3d 820 (N.Y. App. Div. 2005), *leave to appeal dismissed*, 843 N.E.2d 1158 (N.Y. 2005).

3. Review is also warranted in this case because it presents an issue of recurring importance. Standard arbitration agreements authorize awards of punitive damages. In particular, standard arbitra-

tion agreements contemplate arbitration of "all disputes," and this Court has interpreted such agreements to authorize an arbitrator to award punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 & n.7 (1995). Accordingly, under the decision below, any party to a standard arbitration agreement is subject to unlimited punitive damages awards.

Respondents assert (Br. in Opp. 21) that the issue is unimportant because parties can contract around an arbitrator's authority to impose excessive punishment. But that possibility has never served as an obstacle to review of important and recurring issues presented by standard arbitration agreements. *See, e.g., Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1899 (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Indeed, this Court recently granted a petition to review a question concerning an arbitrator's authority under a standard agreement to entertain a class action, notwithstanding the respondents' argument that parties could contractually exclude the arbitrator's assertion of such authority. Respondents' Br. in Opposition to Certiorari at 21, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (No. 08-1198); 129 S. Ct. 2793 (2009) (granting petition).

The Court's refusal to deny review of issues of recurring importance based on the possibility of contracting around the issue is understandable. Parties should not have to contract around conduct that exceeds an arbitrator's authority in the first place. And the possibility of contracting around an arbitrator's unjustified assertion of authority is wholly in-

adequate as a remedy for persons who remain bound by existing agreements.

4. Respondents argue against certiorari on the ground that the court of appeals' decision is correct on the merits. Br. in Opp. 11-12, 22-26. Respondents' arguments on the merits, however, may be considered by the Court after granting review and afford no basis for denying certiorari, particularly in light of the conflict among the lower courts and the recurring importance of the question presented by the petition.

Respondents, in any event, err in their merits arguments. As discussed, the arbitrators' $20 million punitive damages award in this case is plainly excessive under this Court's precedents. Respondents make no claim to the contrary. Instead, they argue that the Ninth Circuit was justified in failing to provide any meaningful review of that award. Respondents are incorrect.

a. Respondents first contend that this Court's decision in *Hall Street Associates* "flatly foreclose[s]" review of this case, because it provides that Section 10(a) of the Federal Arbitration Act (FAA), 9 U.S.C. § 10(a), lays out the exclusive grounds for vacatur of an arbitration award. Br. in Opp. 11-12. That argument is plainly incorrect.

"[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore v. Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Far from expressly precluding review of a claim that an arbitrator's award of punitive damages is constitutionally excessive, the FAA, in fact, au-

thorizes such review. The FAA explicitly calls for vacatur of an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). When arbitrators impose punitive damages awards that manifestly disregard the limitations imposed by due process, they have "exceeded their powers." Accordingly, review for constitutional excessiveness is entirely consistent with the FAA.

b. Respondents also contend that due process does not apply to arbitration awards. Br. in Opp. 16-17. But that argument fails to distinguish between procedural and substantive due process. The cases on which Respondents rely do not address whether *substantive* due process limitations on the size of a punitive damages award apply, which is what is at issue here. Instead, those cases reason that the parties waive the strictures of procedural due process by agreeing to the more informal procedures of arbitration. *See, e.g., Todd Shipyards*, 943 F.2d at 1063-64; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001).

c. Respondents also argue that an award imposed by an arbitrator and confirmed by a court fails to constitute state action. Br. in Opp. 22-26. This Court, however, has repeatedly recognized that punitive damages serve the public functions of retribution and deterrence—the same "interests advanced by the criminal law." *Exxon Shipping Co.*, 128 S. Ct. at 2628; *see also Philip Morris USA v. Williams*, 549 U.S. 346, 358-59 (2007) (Stevens, J., dissenting) ("There is little difference between the justification for a criminal sanction, such as a fine or a term of

imprisonment, and an award of punitive damages."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing" and are "an expression of . . . moral condemnation"). Accordingly, in awarding punitive damages, arbitrators necessarily perform a public function.

Not only does an arbitrator necessarily perform a public function when awarding punitive damages, but state action enables the performance of that public function from beginning to end. The federal statute governing arbitration is supplemented by state statutes to the extent not inconsistent with the federal regime, and together they empower the courts to strictly enforce agreements to arbitrate on motions to compel; determine, where necessary, the appointment and disqualification of the arbitrators and the content of their mandatory disclosures; enforce their statutorily granted subpoena powers; authorize discovery, including the taking of depositions under oath; and grant the arbitrators the power to administer oaths. *See generally* 9 U.S.C. §§ 1-16; Cal. Code Civ. Proc. §§ 1280-1292.2. Most importantly, the resulting award would be a hollow formality without judicial review and confirmation of the award, the resulting conversion of the confirmed award into a judgment of the court, and the court's enforcement of that judgment just as if it were a judgment resulting from a civil action. Accordingly, an arbitrator's imposition of punitive damages is subject to the Constitution's limits on excessiveness. *See Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531

U.S. 288, 296 (2001); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

d. The consequence of adopting the court of appeals' contrary conclusion fortifies the need for review. As noted above, under the court of appeals' approach, any arbitration panel has unconstrained authority to mete out as much punishment as it desires so long as it purports to apply due process limitations, and a court has no choice but to affirm the resulting punitive damages award. Thus, the decision below affirmed $20 million in punitive damages based upon a compensatory damages award of only $1 million even though the damages were purely economic and Respondents failed to offer any colorable justification for such a massive punitive damages award. Indeed, it is undisputed that under the decision below a punitive damages award of $40 million, $100 million, or, indeed, any amount would have had to be confirmed. Thus, parties engaged in arbitration will have no protection against grossly excessive punitive damages awards throughout the Ninth Circuit. This Court should grant review to decide whether its decisions countenance that outcome.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL H. BROMBERG
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
5th Floor
Redwood Shores, CA 94065

FRED G. BENNETT
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017

SRI SRINIVASAN
(Counsel of Record)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT
JUSTIN FLORENCE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

STEVEN L. SMITH
ROBIN E. DEVAUX
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111

February 2, 2010